

# AMERICAN BAR ASSOCIATION JOURNAL

VOL. XII

JUNE, 1926

NO. 6



## *Referees in Bankruptcy*

A NATIONAL conference of Referees in Bankruptcy will be held in Detroit on July 9 and 10. The objects of this conference, according to Mr. Paul H. King, one of the Referees for the eastern district of Michigan and also one of the principal promoters of the meeting, "are twofold: first, to establish closer contact between the Referees and secondly, to form, if possible, a permanent organization. There are many details of bankruptcy administration which are not uniform in the several jurisdictions and it is our hope and belief that through such an organization we could obtain a much greater degree of uniformity in practice. Again we believe that in the discussion of questions of administration much could be accomplished in the way of expediting the handling of cases and reducing the expense.

"About two hundred and fifty Referees have replied that they favor the idea and of this number about one-half indicate a desire to attend. Committees have been appointed by the Presidents of the Detroit Bar Association, the Detroit Lawyers' Club, and the Michigan State Bar Association to collaborate with the Referees in the handling of the conference.

"An interesting program is being prepared on which will appear former Referee Harold Remington, Congressman Earl C. Michener, Chairman of the Sub-Committee of the Judiciary Committee of the House in charge of the pending amendments to the Bankruptcy Act, and others. A questionnaire sent out to all of the Referees disclosed a very interesting list of subjects which they would like to discuss at the meeting and a careful selection is being made of these for assignment to the individual Referees for presentation to the conference."

## *American Historical Association Endowment*

THE American Historical Association has launched a project for raising an endowment fund of a million dollars for the promotion of "American history and of history in America." The plan is being widely indorsed editorially by an enlightened press, and leaders in American public life are lending it their aid by accepting membership on the National Advisory Committee. Vice-President Dawes, Charles E. Hughes, Herbert Hoover, Newton D. Baker, William E. Borah, William Allen White are among those whose names appear on this committee. The fund is imperatively required to enable the Association to develop its present useful services and to meet pressing needs which have heretofore been neglected for lack of funds. Space is lacking here to note the various fields in which it is proposed to carry on the policy of organized historical research with the funds provided, but lawyers will be interested in the plan to provide a proper historical approach to legal, economic and social problems by special studies in the "history of the common law in America, with the various influences—social, economic, and religious—which have worked upon the inherited English system and adapted it to American uses—an admirable opportunity for cooperation between the lawyer and the historian; the history of American business; the history of agriculture and rural life (a few pioneers have already pointed out large possibilities); the history of the American family, another subject on which something more than surface study of recent developments is badly needed."

The movement to raise an endowment fund was started nearly a decade ago, but only recently has it been possible to get the work actively under way. A general committee has been set up with former Senator Beveridge as chairman and Professor Everts B. Greene, of Columbia, as vice-chairman,

and headquarters have been established in 110 Library, Columbia University, N. Y., to which communications should be addressed; a National Advisory Committee composed of about 130 prominent men in all parts of the country and in the various walks of life has been organized; and steps have been taken to bring the enterprise before the public in the press. The plan of the campaign adopted by the general committee involves the organization of state or district committees throughout the country and some twenty-five of these are already set up or in process of organizing. These committees include not only professional members of the association but also prominent public men, and it is significant of the interest taken in the movement that Judge Hughes has accepted the chairmanship of the New York City committee.

"Among the outstanding achievements of the association," said Mr. Solon J. Buck, Executive Secretary, in a recent address, "are the development of professional and scientific spirit among its members through its annual meetings; and the publication of the 'American Historical Review,' generally recognized as the leading historical periodical in the world, and of a long series of 'Reports,' containing not only accounts of meetings and papers read at them but important collections of documents and bibliographies of great value to research workers. The prizes offered annually by the association for the best studies in certain fields have stimulated scholarly research, and its various committees on the teaching of history have largely shaped the history curriculum in the schools of the nation. The Public Archives Commission set up by the association has made

known to scholars the valuable materials for history in the archives of the states and has promoted measures for the better care of such materials. Another subsidiary body, the Historical Manuscripts Commission has located and edited for publication important collections of private papers such as those of Calhoun and Austin, the diary of Salmon P. Chase, and the autobiography of Martin Van Buren."

### *Women's Legal Society Convention*

WHILE women have been more or less in evidence at the Bar Association conventions for a number of years, most of them were not members of the profession of law but merely related to it by blood or marriage. This year the delegation of women will be noticeably augmented, for the Phi Delta Delta Women's Legal Fraternity (International) will hold its convention in Estes Park, Colo., immediately preceding that of the Bar Association, and many of its members will remain in Denver for the sessions of the Bar convention. The setting of their sessions at a time and place to make attendance at both conventions possible with minimum expenditure lends support to the idea that women possess keen bargain-hunting instincts.

Founded about fifteen years ago, when woman law students were noticeable for their scarcity, Phi Delta Delta now includes within its ranks many of the women pioneers of the profession. As women have entered upon the study of the law in greater numbers in recent years its membership has increased so that it is now installed in law schools

## **Delaware Corporations**

### **ORGANIZED**

### **REPRESENTED**

Assistance to Lawyers in Organization—Maintenance of Statutory Local Office—Full and Complete Service.

Digest of Delaware Corporation Laws—Pamphlet on Stock Without Par Value free to Lawyers on request —Also Forms for Organizing Corporations.

The Best Book on Delaware Corporation Law

## **DELAWARE CORPORATIONS AND RECEIVERSHIPS**

(Second Edition, 1925)

by Josiah Marvel

Full text of law, annotated with all decisions, Statutory and Case Law and Rules of Court Governing Receiverships of Delaware Corporations. Also Forms for organizing Delaware Corporations.

Cloth bound 268 pages Price \$3.00 Postpaid

## **CORPORATION SERVICE COMPANY**

Equitable Building

Wilmington, Delaware

Tel. Wilmington 132

## **THE NEW COMPACT EDITION OF THE ORIGINAL EDITION OF THE U. S. SUPREME COURT REPORTS**

—is an exact duplicate of the original edition (the only authorized edition) every page of the original edition being photographed.

—New edition occupies 4½ feet of shelf space—as compared with 40 feet needed for the old.

—New edition costs 99c for each official volume—the cheapest, as well as the most desirable edition.

Write for descriptive folder and details of liberal terms now being offered.

FOR SALE  
BY

## **THE HARRISON COMPANY**

*Publishers of Law Books*

ATLANTA

GEORGIA

LAW BOOKS PUBLISHED, BOUGHT, SOLD  
AND EXCHANGED

throughout the United States and in Canada. Among the professionally older members of this fraternity a number have been appointed or elected to high offices. In a list of such offices are found an Assistant Attorney General of the United States, five Judges, a Congresswoman, a diplomat, several Assistant State Attorneys General, a Supreme Court Reporter, a State Senator, and any number of Federal, State, County and City Court officers and attachés.

### Prizes for Legal Monographs

THE Faculty of Law of Northwestern University, administering the income of the Charles C. Linthicum Foundation, announces that the sum of one thousand dollars and a suitable medal will be awarded to the author of the best essay or monograph submitted by March 1, 1927, on "The Law of Radio-Communication," the scope to include the aspects of the subject as a problem of international law and as a problem of legislation in the U. S.; also that a like sum and a suitable medal will be awarded to the author of the best essay or monograph, submitted by March 1, 1928, on the subject known as "Scientific Property," i.e., the granting of a quasi-patent right to the maker of a scientific discovery. The main conditions of the award are as follows:

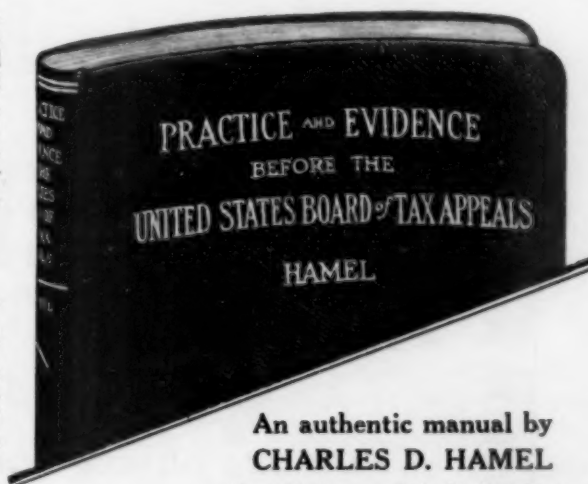
1. The award will be made by vote of the Faculty of Law, after scrutiny of the best works offered; but the Faculty may delegate the preliminary selection to other persons.
2. To be eligible for the award the author must be at the date of submission a member of the bar or a student registered in a law school in the United States or Canada.
3. The Faculty reserves the right to make no award, if in its judgment no work submitted is of sufficient merit.
4. The award in the first offer will first be made public in June, 1927, on the occasion of the dedication of the new buildings of the Law School.
5. The copyright of the work receiving the award will remain in the author, but the Faculty will arrange for its publication if desired. If published by the author, its title page must mention the award of the Charles C. Linthicum Foundation Prize.
6. The work submitted may be one already published in print at the time of submission. Manuscripts submitted must be typewritten on paper of size of legal cap or typewriter or commercial note.
7. Each work submitted should be identified only by a Latin word or short phrase typed on the title page or first page and on the enclosing envelope. It should be forwarded in another envelope containing also (1) the letter of submission, signed only by the identifying word or phrase, (2) a third sealed envelope bearing outside the identifying word or phrase and containing a paper giving the true name and address of the author and the fact making him eligible under par. 2.
8. To verify arrival of the work the author should forward it by registered mail with return receipt; but the Faculty will not have knowledge of the name on the receipt.
9. Address: The Linthicum Foundation, Northwestern University Law School, Chicago, Illinois.

### Please Note the Journal's New Address

From this date the address of the AMERICAN BAR ASSOCIATION JOURNAL will be "Room 1119 The Rookery Building, No. 209 S. La Salle St., Chicago, Ill.," instead of "Room 1612 First National Bank Building, No. 38 S. Dearborn St.," as formerly.

### Look Before You List

Mr. Robert M. Toms, of Detroit, Prosecuting Attorney of Wayne County, Michigan, has written the AMERICAN BAR ASSOCIATION JOURNAL suggesting that lawyers solicited to list their names in the "National Guaranteed Bar," a concern incorporated under the Michigan Laws for the purpose of "publishing a directory of high class attorneys and of allied professions to promote legal business," investigate the matter thoroughly before taking action. Mr. Toms' address is 509 Police Headquarter's Building, 1300 Beaubien St., Detroit, Mich., and he will furnish information on the subject to those who desire it.



### An authentic manual by CHARLES D. HAMEL

*First Chairman of the United States Board of Tax Appeals; formerly Chairman of the Committee on Appeals and Review.*

THIS helpful manual provides an accurate and succinct statement of practice and procedure before the Board under Sec. 907 (a) of the Revenue Act of 1926. Under this section the rules of evidence applicable are those of the Equity Court of the District of Columbia.

This is the only book based upon the decisions of the Equity Court of the District of Columbia, several hundred of which are cited. Prepared by Charles D. Hamel, who, as First Chairman of the Board, brings to this book exceptionally intimate experience in this field.

### Points to Watch

A practitioner before the Board should be specially familiar with all of Chapter 25 of the District Code, which deals with oaths, perjury, testimony de bene esse, depositions, testimony in equity cases, competency of witnesses, confidential communications, proof of a record debt, proof of deeds and wills, production of books and papers, and the like. Should know the cases as well as the Code. Fully covered in this book.

### Some of the Points on Evidence Covered

Burden of Proof  
Presumption  
Judicial Notice  
Competence  
Privileged communication  
Relevancy and materiality  
Admissions  
Declarations  
Hearsay  
Opinions and conclusions  
Expert testimony  
Proof of value  
Best evidence  
Documentary evidence  
Real evidence  
Examination of witnesses  
Order of proof  
Rebuttal  
Objection and exceptions  
Offers and proof  
Motions  
Weight of Evidence  
—and other topics

The book also discusses—  
—Procedure—Jurisdiction of the Board—Preparing an Appeal—The Hearing or Trial—Procedure After Trial—Taking the Case to Court, and other topics essential in successful practice before the Board. Handsome limp-leather binding. Price, ten dollars.

Sent on free examination. Published by

PRENTICE-HALL, Inc.

70 Fifth Avenue

New York

Prentice-Hall, Inc., 70 Fifth Avenue, New York.

Without cost to me, you may send a copy of Hamel's "PRACTICE AND EVIDENCE BEFORE THE U. S. BOARD OF TAX APPEALS" for five days' FREE EXAMINATION. Within that time I will remit ten dollars in full payment or return the book without further obligation.

Name .....

Firm .....

Address ..... HT-161

B/V

B/V

# REMEMBER

If you need one of the following  
books and don't buy it

*You are paying for it just the same*

Arnould on Marine Insurance . . . . .	\$30.00
Birdseye's Abbott's Ency. of General, Business and Legal Forms . . . . .	18.50
Carver on Carriage of Goods by Sea . . . . .	18.00
Congdon on General Average, 2nd Edition . . . . .	6.00
Cook on Corporations, 6 vols., 8th Edition . . . . .	50.00
Frohlich & Schwartz on Motion Pictures . . . . .	10.00
Lewis on the Law of Leases . . . . .	10.00
Marsden on Collisions at Sea, 8th Edition . . . . .	15.00
Maupin's Marketable Title to Real Estate, 3rd Edition . . . . .	10.00
Nims on Unfair Competition, 2d Edition . . . . .	10.00
Roscoe on Damages on Collisions at Sea . . . . .	5.00
Sedgwick on the Measure of Damages, 9th Edition . . . . .	30.00
Walker on Patents, 5th Edition . . . . .	12.00
Williston on Contracts, 5 vols. . . . .	50.00
Williston on Sales, 2 vols., 2nd Edition . . . . .	20.00
Willoughby's Constitutional Law of the United States, 2 vols. . . . .	15.00
Wolfe's Inheritance Tax Calculations . . . . .	4.50
White on New York Corporations, 9th Edition, and Annual 1924 . . . . .	22.00

**BAKER, VOORHIS & CO.**  
45 JOHN ST. ~ ~ ~ NEW YORK

# THE AIR COMMERCE ACT OF 1926<sup>1</sup>

Situation that Confronted Federal Government in Attempt to Provide Sound Legal Basis for Civil Air Navigation—Regulatory Features of New Law—Civil Administrative Penalties—Navigable Airspace Question Dealt With—Administration Mainly Vested in Secretary of Commerce

By FREDERIC P. LEE

*Legislative Counsel, United States Senate*

THE attention of the American Bar Association was first called to the subject of legislation upon civil air navigation by the resolution presented to the Association in 1911 by the late Chief Justice Simeon E. Baldwin of Connecticut. The resolution incorporated and asked that the approval of the Association be given a draft of a bill proposed for Congressional enactment, forbidding interstate or foreign aircraft flights without a pilot's license, providing for the marking and registration of aircraft, and requiring the filing of a bond by the owner of the aircraft to answer for all damages caused by any flight, whether the damage was attributable to negligence, inevitable accident, or vis major.

The Committee on Jurisprudence and Law Reform of the Association reported against the adoption of the resolution as not being upon a subject of sufficient general interest to require legislation. Defeated in his efforts to obtain action from the Association, Justice Baldwin, as Governor of Connecticut, obtained the passage of the first State aeronautics law when the Connecticut legislature passed a measure along the lines of the one presented for the approval of the Association.<sup>2</sup>

Between the time of Justice Baldwin's activity and the passage of the Air Commerce Act, there have been years of endeavor to procure a sound legal basis for air navigation in this country. During this period, and particularly the last half dozen years, the American Bar Association, through its Committee on the Law of Aeronautics, has played a persistent and effective part in this procurement, though only after a rather natural change in attitude toward the practicability of air commerce and after many vicissitudes in legal view as to the Federal power in the matter. The first action following that of Justice Baldwin, which may in any way be attributed to the Association, was that of the Conference of Bar Association Delegates in 1919, an organization affiliated with the American Bar Association. This conference appointed a committee of which Mr. William Velpau Rooker, of Indiana, was chairman. The committee made reports in 1920 in which the enactment of Federal legislation was urged. The authority for such legislation was founded upon the Constitutional grant to the Federal courts of jurisdiction in admiralty and maritime cases.

The American Bar Association Committee on the Law of Aeronautics was established in 1920. The occasion for the action of the Association was

the appointment by the Conference of Commissioners on Uniform State Laws of a Committee on the Uniform Aeronautics Act to draft a uniform State aeronautics law. Some of the members of the American Bar Association felt that Federal legislation was of equal or greater importance than State legislation, and that if a committee of the Conference was to work upon the subject, it was highly desirable that a committee of the Association be appointed to cooperate. The first work of the Association's committee was the preparation under the direction of its chairman, Charles A. Boston, of New York, of an able report giving extensive consideration to the fundamental legal problems of air navigation. The Committee reached the conclusion that the needs of air navigation required a nation-wide uniform regulatory law, that no such uniformity could be expected from the 48 State legislatures, and that therefore the law should emanate from a single source of power, the Federal Government. The Committee found that the power to provide such complete uniform control should be "conferred upon Congress by constitutional amendment and should not be seized in the guise of the exercise of existing powers."

Subsequently a joint conference was held in Washington, D. C., in February, 1922, by the committee of the Conference of Commissioners on Uniform State Laws and the committee of the American Bar Association, under the guidance of their respective chairmen, George G. Bogert, then of New York and dean of the Cornell University School of Law, and William P. MacCracken, Jr., of Illinois, the present Secretary of the Association and successor to Mr. Boston as chairman of the Committee. Open hearings were had with discussion by representatives of the Government, aircraft manufacturers, and other interested parties. The conference agreed on the following principles, among others:

First. Federal legislation was necessary and the committee of the Conference of Commissioners on Uniform State Laws should in drafting their Uniform Aeronautics Act eliminate all regulatory provisions, leaving such provisions to be covered by the Federal Act.

Second. No attempt should be made to obtain a Federal constitutional amendment vesting legislative jurisdiction over the regulation of air navigation exclusively in the Congress, for the reason that such regulatory powers belong to Congress without any such amendment, and in any case popular interest was not sufficiently aroused to make any such amendment possible without unreasonable delay.

Third. The two committees should offer their services to the committees of Congress and the State legislatures in such ways as might prove advisable.

In pursuance of such agreement the American Bar Association's Committee on Law of Aero-

1. Public No. 254, 69th Cong., approved May 20, 1926.

2. Conn. Gen. Stat. 1918, c. 176, §§107-17.

nautics has at various times recommended to the Association that no consideration be given to the question of a constitutional amendment, that uniform national legislation based upon the commerce clause similar to that embodied in the so-called Winslow Bill be indorsed, and that the committee cooperate with national and State authorities in procuring the adoption of legislation. These recommendations met with the approval of the Association. In cooperation with the national authorities the Association's Committee, through Mr. MacCracken and at the request of Mr. Winslow of Massachusetts, chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, advised with the Legislative Counsel's Office in the preparation of the original draft of the Winslow Bill, appeared at the hearing held by the House Committee, advised in the consideration of the measure by the Department of Commerce, and from time to time submitted to the House Committee such changes as the Association's Committee found desirable. That this cooperation was appreciated by the House Committee is evident from the following comment at the hearings by its then chairman:

I wish in behalf of the Committee to express our very great thanks to Mr. MacCracken and his associates not only for the great amount of work they have done, but for the fine spirit with which they have rendered their service. It has never been a question of bickering with them or a question of pride of opinion, or otherwise than a most helpful cooperation.

This cooperation was continued in connection with the newly enacted Air Commerce Act of 1926.

## II.

While consideration of the Federal air navigation legislation was pending, nineteen States and Hawaii have followed Connecticut's example and enacted air navigation laws. Ten of these laws<sup>3</sup> were the Uniform Aeronautics Act approved by the Conference of Commissioners on Uniform State Laws. Such laws contain no regulatory provisions, but are restricted to declarations relating to sovereignty and ownership of airspace, lawfulness of flight, liability for injury, the jurisdiction of air torts and crimes and the law applicable thereto.

Nine other States<sup>4</sup> have provided regulatory laws covering such subjects as registration and inspection of aircraft, licensing of members of the crew, air traffic rules, and inspection and license fees. Such regulatory provisions are not uniform among the several States either in their substance or administration.

In addition while consideration of Federal air navigation legislation was pending, the United States signed the International Air Navigation Convention of October 13, 1919.<sup>5</sup> The Convention

recognized the sovereignty of each nation in the airspace above its territory and provided an international system applicable to all foreign air navigation in respect of such matters as registration, prohibited areas, rating of aircraft and airmen, air traffic rules, maps, meteorological information, log books, entry of merchandise, and the like. Under Article 5 of the Convention a contracting nation is required to bar from its airspace aircraft of non-contracting nations, except that such aircraft may be allowed therein by special and temporary permit. The United States at the time of the signing of the Convention made reservations as to Article 5 in respect of aircraft of non-contracting nations of the Western Hemisphere, and also made reservations giving this country freedom from the customs regulations and permitting it to set up prohibited areas or airspace reservations from which foreign craft only are barred.

The Convention has never been submitted by the President to the Senate for the advice and consent of that body to its ratification nor has the President or the State departments made any official statement as to the reason for this failure. It is to be noted, however, that the International Commission for Air Navigation which administers the Convention and has power to amend certain annexes thereto, is by the terms of the Convention "under the direction of the League of Nations", and that disputes in interpreting the Convention are to be determined by the Permanent Court for International Justice. In the meantime the Convention has been placed in effect by Belgium, the British Empire, Bulgaria, France, Greece, Italy, Japan, Persia, Poland, Portugal, Rumania, Kingdom of the Serbs, Croats, and Slovenes, Siam, Czechoslovakia, and Uruguay.

## III.

The situation that confronted the Federal Government in its attempt to provide a sound legal basis for civil air navigation involved, as set forth above, (1) the various conflicting theories as to the Congressional power to enact regulatory air navigation legislation, (2) the action of some States in providing and of others in omitting to provide regulatory legislation for air navigation in the airspace above their lands and waters, (3) the laws of many States dealing with ownership of airspace, and lawfulness vel non of flight, and the liability of carriers by air for injury to the person or property of the surface owners, (4) the doctrines of sovereignty in the airspace as set forth by some State laws and the International Air Navigation Convention, and (5) the discriminatory effect of the Convention upon the foreign air commerce of the United States and other non-contracting nations. Further, the problem of Federal regulation presented the development of a suitable system of penalties and their enforcement.

To meet this situation the Congress enacted the Air Commerce Act of 1926. Civil air legislation was first passed by the Senate in the 67th Congress as the Wadsworth Bill.<sup>6</sup> In the 68th Congress the Senate again passed the Wadsworth Bill,<sup>7</sup> but the House in lieu thereof reported a substitute measure known as the Winslow Bill. This measure was prepared, under the direction of Representative Winslow, chairman of the Committee on Interstate

3. Delaware, Laws 1923, c. 199; Idaho, Laws 1925, c. 92; Nevada, Laws 1923, c. 66; North Dakota, Laws 1923, c. 1; South Dakota, Laws 1925, c. 6; Tennessee, Laws 1923, c. 30; Utah, Laws 1923, c. 24; Vermont, Laws 1923, No. 155; Hawaii, Revised Laws 1925, c. 214; Michigan, Laws 1923, No. 224.

4. California, Laws 1921, c. 783; Connecticut, Laws 1925, c. 249; Kansas, Laws 1921, c. 246; Maine, Laws 1923, c. 390, am. Laws 1925, c. 185; Massachusetts, Laws 1921, c. 90, am. Laws 1922, c. 534; Minnesota, Laws 1921, c. 433, and Laws 1925, c. 406; New Jersey, Laws 1921, c. 124; Oregon, Laws 1921, c. 45, am. Laws 1923, c. 186; Wisconsin, Laws 1925, c. 35.

5. The International Air Navigation Convention, texts of articles and annexes, together with amendments thereto and regulations issued thereunder up to June, 1924, and certain materials relating to the present status of the Convention and its relation to the Winslow bill, was printed as a compilation prepared by the Office of the Legislative Counsel for the use of the Committee on Interstate and Foreign Commerce of the House of Representatives, and entitled *International Air Navigation Convention*, and dated of December 1, 1924. Materials subsequent to that date will be found in the *Official Bulletin of the International Commission for Air Navigation* published by the Commission in Paris at irregular intervals.

6. S. 3076, 67th Cong.

7. S. 76, 68th Cong.

and Foreign Commerce of the House of Representatives, by a sub-committee of which Representative Merritt of Connecticut was chairman. Other members were Representatives Mapes of Michigan, Lea of California, Hoch of Kansas, Sanders of Indiana and Hawes of Missouri. This subcommittee gave most exhaustive consideration to the legal features of the bill.<sup>8</sup> The Winslow substitute was reported to the House late in the session, but no action was then had. The measure is of importance, however, for excepting the provisions as to the rating of aircraft and airmen engaged in non-commercial navigation and the provisions authorizing carriers by air to limit their liability for property damage, substantially all the features of the Winslow bill are either embodied in or are the source of many of the provisions of the Air Commerce Act of 1926.

In the first days of the present Congress the Bingham-Parker Bill<sup>9</sup> was passed by the Senate in lieu of the Wadsworth Bill. This prompt action was due to the vigorous interest in aeronautics of Senator Bingham of Connecticut, an interest attributable doubtless to the fact that the Senator is an air pilot, and was Chief of Air Personnel of the Army and Commandant of the flying school at Issoudun during the World War. The House subcommittee consisting of Messrs. Merritt, Mapes and Lea, all members of the former subcommittee recommended and the House passed a revised Winslow Bill as a substitute for the Bingham-Parker Bill. In Committee on Conference the Bingham-Parker Bill and the House substitute were both rewritten as the Air Commerce Act of 1926, the form in which civil air navigation legislation finally received Congressional approval.<sup>10</sup>

#### IV.

##### Regulatory Features

Under the Air Commerce Act of 1926 an aircraft may not be registered and become entitled to our protection unless owned by a citizen of the United States or by a corporation or association which is organized under our laws and in which two-thirds of the managing officers are citizens of the United States and 51 per centum of the voting interest is controlled by citizens of the United States. Registration is not in terms mandatory, but is merely a privilege afforded to any qualified applicant. However, no person may engage in transportation of persons or property for hire if such transportation is among the several States or with foreign nations and is either in whole or in part by aircraft, nor may any aircraft be navigated from a State to or through a place outside thereof in furtherance of a business, or be navigated from a State to any place outside thereof for operation in the conduct of a business,—unless the aircraft is registered.

The above coverage obviously includes not only the business of a common carrier by air, but also the transportation of the mails, transportation of factory products from the main plant to a branch office by the manufacturer's own air transport line, and the use of their own or their employer's aircraft by salesmen or insurance agents or professional men while travelling upon business. Again it is obvious that the coverage would include the gypsy flyer at

county fairs if he navigated his aircraft from a place of exhibition in one State to a place of exhibition in another, or from a place in one State where he has conducted intrastate transportation for hire to a place in another State where he again conducts intrastate transportation for hire. On the other hand, the provisions of the Act do not cover the use of aircraft for the purposes of transportation between home and office even though such transportation is interstate or foreign. Nor would the provisions seem to have any unreasonably restrictive application to flights for scientific or experimental purposes, for the reason that such flights would not be interstate or foreign but would be conducted wholly within the limits of one State.

From the above it will be seen that so far as registration is concerned the distinction drawn by the Act is not primarily between interstate and foreign air navigation on the one hand and intrastate air navigation on the other, but the distinction drawn is between air navigation for commercial purposes and air navigation for non-commercial purposes. The only unregistered aircraft that may engage in intrastate commercial navigation is an aircraft that does not carry passenger or express traffic or mail matter originating outside of or destined for a point beyond the State and that does not itself ever cross State lines for business purposes. Aircraft used for pleasure flight or for flight between home and office or for police or other governmental purposes, State or Federal, are, however, subject to no such indirect compulsion to register.

The compulsory inspection or examination and rating of aircraft and airmen is confined to registered aircraft and their airmen, whether or not registration on the part of such aircraft was necessary in order that it might lawfully navigate. The theory of the Act is that the privilege of registration as an aircraft of the United States if availed of carries with it the duty of operating only airworthy craft and qualified crews.

Air navigation facilities, such as airports, emergency landing fields, light and other signal structures, radio directional finding facilities, and radio or other electrical communication facilities, may, if used by registered aircraft, be examined and rated, but such examination and rating is in no case a prerequisite to their lawful operation.

Foreign-owned aircraft are specifically excluded from all interstate and intrastate air commerce. Such craft may, however, at the discretion of the Secretary of Commerce engage in foreign commerce and in domestic non-commercial navigation without being registered or having the aircraft or its airmen rated under our laws, provided such aircraft are registered under foreign law and the foreign country (despite the provisions of the International Air Navigation Convention) confers a reciprocal privilege upon aircraft registered under our laws and upon our airmen. It is to be presumed that the Secretary of Commerce in exercising this discretion will deny the exemptions to aircraft and airmen of a foreign country whose laws are found to be ineffective (either in their substantive provisions or in their administration) for the adequate protection of air navigation in this country.

The air traffic rules, unlike registration and rating of aircraft and airmen, apply to all aircraft, registered or unregistered and whether or not engaged in commercial or non-commercial or in foreign, in-

8. See, H. Rpt. No. 572, 69th Cong., pp. 7-8.

9. S. 41, 69th Cong.

10. For the views of Managers on part of the House as to the effect of the provisions of the Air Commerce Act of 1926 and their relation to the Senate bill and the House substitute, see H. Rpt. No. 1162, 69th Cong., 1st Sess., pp. 10-14.

terstate, or intrastate navigation in the United States. The air traffic rules apply both to Federal and State governmental aircraft and to all foreign aircraft allowed to navigate in the United States.

The scope of the air traffic rules is defined by the Act as rules for either the navigation, protection, or identification of aircraft. These qualifications are so broad, however, as not to afford much of a limitation save to emphasize the safety element. Nevertheless, the qualifications obviously would prohibit rules upon such matters, for instance, as rates, service, liability for personal injury or property loss or damage, supervision of the financial structure of carriers by air, and the establishment, extension, and abandonment of air lines. The air traffic rules specifically include rules as to safe altitudes of flight and rules for the prevention of collision between vessel and seaplanes. Further information may be obtained from the following portion of the statement of the Managers on the part of the House:

No attempt is made by either the Senate bill or the House amendment to fully define the various classes of rules, that would fall within the scope of air traffic rules, as, for instance, lights and signals along airways and at air-ports and upon emergency landing fields. In general, these rules would relate to the same subjects as those covered by navigation laws and regulations and by the various State motor vehicle traffic codes. As noted above, surplusage was eliminated in specifying particular air traffic rules in order that the term might be given the broadest possible construction by the Department of Commerce and the courts.

Assuming that the above statement of the House Managers is correct, there are still left many interesting questions as to whether air traffic rules include, for instance, upon analogy to the vessel navigation laws, rules as to the removal of obstructions in the navigable airspace and rules as to radio communication with aircraft, or upon analogy to the State motor vehicle laws, rules as to the pedestrian or vehicular land traffic at landing fields and rules as to the use of aircraft for illegal or immoral purposes.

Apparently rules as to the maintenance of log books, rules as to inspection, examination, and registration fees, and rules as to signal or markers to be carried by land and water structures, may be included in the air traffic rules. These items were specified in the House substitute and fees were, in addition, specified in the Senate bill, yet all three items were eliminated by the Committee of Conference without any explanation which indicates their omission was merely a matter of the elimination as surplusage of details which would unquestionably fall within the scope of the term "air traffic rules."

The question of prohibited areas as a phase of air traffic rules was cared for specifically by the Act. The President is authorized to provide by Executive order for the setting apart and the protection of airspace reservations in the United States for national defence or other governmental purposes, and in addition in the District of Columbia for public safety purposes. The regulations for such airspace reservations apply to all aircraft whether engaged in commercial or non-commercial or in foreign, interstate, or intrastate navigation.

Finally, the laws relating to the entry and clearance of vessels, the customs laws, the immigration laws, and the public health laws are to be made applicable to air commerce by regulations of the respective Secretaries administering such laws. At

present the entry and clearance laws and the customs laws by reason of definitions of vessel and vehicle which are broad enough to include aircraft, apply to air commerce. Being framed, however, without a knowledge of or with special regard to the needs of air commerce, such laws are so unreasonably restrictive in their application to air commerce that carriers by air would find it impossible in practice to comply with the provisions of such laws.

The above summary of the regulatory features of the Act present the question as to the source of the Congressional power to enact such legislation. Without here discussing what seems to be the lack of merit of some of the earlier suggested constitutional bases,<sup>11</sup> it is enough to say that the Congress chose to find its authority to enact the Air Commerce Act of 1926 in its power to regulate "commerce with foreign nations and among the several States." This constitutional provision vests in the Congress the power to regulate transportation by water in such respects as registration and licensing of vessels, safety inspection, supervision of the crew, and issuance of navigation rules.<sup>12</sup>

The Constitution contains no power specifically devoted to water navigation. It is the commerce power which gives Congress authority to legislate as to such navigation. Similarly it is believed that the commerce power gives power to Congress to legislate upon air navigation. The exercise of the power to regulate commerce is not confined to the regulation of instrumentalities known or in use when the Constitution was adopted, but such power keeps pace with the progress of the country and adapts itself to the many developments of time and circumstances.<sup>13</sup>

However, admitting that the power to regulate commerce generally includes the power to regulate air commerce in particular, does that power extend to non-commercial air navigation or to intrastate air commerce? The Act does not limit the air traffic rules to interstate commercial navigation. It further bars foreign aircraft from engaging in intrastate commerce and bars intrastate commerce in the airspace reservations. The necessity for uniformity of air traffic rules and airspace reservation regulations, regardless of the type of navigation involved, seems rather obvious. The necessity is particularly apparent upon interstate air lanes. Again the necessity for the protection of the airspace above Governmental areas, such as forts, from navigation by aircraft would be fully as applicable to aircraft engaged in commerce as to those engaged in non-commercial activities and to aircraft engaged in intrastate navigation as to those engaged in interstate or foreign navigation.

In the field of maritime commerce Federal regulations have always applied to the registration and safety inspection of vessels engaged in operation upon the navigable waters whether or not the particular navigation was interstate or intrastate or commercial or non-commercial. For instance, the first vessel registration law, that of 1789, applied to all vessels upon the navigable waters and the first vessel safety inspection act, that of 1838, had a similar

11. See Bogert, Problems on Aviation Law, 6 Cornell Law Quar. 271, and Law Memoranda upon Civil Aeronautics, compilation prepared for the use of the Committee on Interstate and Foreign Commerce of House of Representatives by the Office of the Legislative Counsel, under date of Jan. 21, 1923, pp. 48-54.

12. The Daniel Ball, 10 Wall. 557, 564; Hartranft v. DuPont, 118 U. S. 222; The City of Salem, 37 Fed. 846.

13. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 19.

application. The application of the marine navigation laws to intrastate and non-commercial transportation has been held constitutional by the lower Federal courts and the Attorney General.<sup>14</sup> No case has ever gone before the Supreme Court. Similarly, safety inspection regulations as to the railroads have been held constitutionally to apply to cars hauling only intrastate freight, because of the fact that the absence of the proper safety appliances might serve to delay interstate trains or injure employees on interstate trains.<sup>15</sup>

The dividing line as to Congressional power is not between interstate and foreign commerce on the one hand and intrastate commerce on the other, but between intrastate commerce which it is necessary for the Federal Government to regulate in order adequately to protect and prevent burdens upon and discriminations against interstate and foreign commerce and intrastate commerce which it is not so necessary for the Federal Government to regulate in order to afford such protection and prevent such burdens and discriminations.<sup>16</sup>

### Penalties

The enforcement of the provisions of the Air Commerce Act of 1926 and regulations thereunder is for the most part by means of a system of civil administrative penalties similar to those by which the customs and navigation laws have always been enforced. A flat penalty prescribed by the statute is imposed by subordinate Federal administrative officers for the violation. The offender then has the right of appeal to the proper Secretary, the Secretary of Commerce, for instance, in the case of air traffic rules. The Secretary may mitigate or remit the penalty so as to fit the offense and his action is final. The penalty as thus finally determined may be collected by proceedings in personam against the person subject to the penalty, or in case the offender is the owner or person in command of the aircraft, by proceedings in rem to enforce a lien for the penalty against the aircraft. These proceedings will conform as nearly as may be to civil proceedings in admiralty, save that trial by jury may be had and seizure of the aircraft may be summarily made by the administrative officer in lieu of the marshal. Such administrative officer is required to release the aircraft upon its seizure in pursuance of process of any court or upon deposit of a bond. The court may also in a case of seizure in pursuance of its process release the aircraft upon the deposit of a bond.

The provisions as to the civil penalties present an interesting question as to whether penalties for violations of air commerce law may be collected in the same manner as the penalties for violations of water commerce laws. The Act has specifically cared for this point, however, for it is provided that the proceedings shall not be admiralty proceedings,—only that such proceedings shall con-

form as nearly as may be to suits in admiralty. Further, the right of jury trial is preserved. Such simulated admiralty proceedings were had in the case of penalties under the Confiscation Acts of 1861 and 1862 and section 10 of the Food and Drugs Act of 1906. Under the present crowded condition of the Federal courts criminal proceedings for the enforcement of minor infractions of the air commerce laws would be extremely expensive, add to the present congestion, and in most cases penalties would be long delayed in their collection. The civil administrative penalty is summary and the proceedings are noteworthy for their absence of technical rules of evidence and pleading.

Proceedings for the collection of penalties against aircraft may be had in case of seizure upon land or water or in the air. If the seizure is had upon the high seas and navigable waters of the United States proceedings for the enforcement of the penalty may, in the case of a vessel, properly be placed within admiralty jurisdiction.<sup>17</sup> It is true that an aircraft has been held a vessel and an injury to one employed upon it has been held to be an injury cognizable in admiralty.<sup>18</sup> Nevertheless, despite such decision it is hard to believe that the enforcement of a penalty against an aircraft would be a matter cognizable in admiralty unless the craft is being primarily operated in maritime as against air commerce. Locality is not the sole test of admiralty jurisdiction as to torts and penalties. The subject matter of a penalty or tort must be maritime in its nature.<sup>19</sup> In no case does a seizure upon land present a case in admiralty.<sup>20</sup> It seems fair to conclude then that the seizure of an aircraft for enforcement of a penalty, regardless of the locality of the seizure, does not present a subject of admiralty jurisdiction and that the position of the Air Commerce Act of 1926 is well taken in providing that such seizures, and penalties in connection therewith, shall not be enforced in strict admiralty proceedings but merely in a simulated proceeding similar to that applied to the statutory precedents above mentioned.

### Aids to Air Navigation

The Air Commerce Act of 1926 provides for the establishment by the Federal Government (within the limits of Congressional appropriations) of aerial lights and other signals structures, radio directional finding facilities, radio or other communication facilities, and emergency landing fields along airways, for the charting of airways and the publication of maps, and for the transfer to the Department of Commerce for maintenance by it of the emergency landing fields and other air navigation facilities along the government air mail routes. The terminal landing fields on such routes, however, are to be transferred to municipalities under arrangements subject to the approval of the President. The Act also provides for the furnishing of meteorological information by the Weather Bureau particularly as to civil airways, and for the sale in emergencies at Government airports of fuel, oil, and equipment and the furnishing in emergencies at such airports of supplies and other assistance, at

14. *City of Salem*, 37 Fed. 846; *Oyster Police Steamers*, 81 Fed. 763; 33 Op. Atty. Gen. 600.

15. *Southern Ry. Co. v. United States*, 230 U. S. 20.

16. See, in general, *Minnesota Rate Case*, 230 U. S. 200; *Wisconsin Rate Case*, 257 U. S. 563; *Dayton-Goose Creek R. R. Co. v. United States*, 263 U. S. 456; *Stafford v. Wallace*, 258 U. S. 495; *Chicago Board of Trade v. Olson*, 262 U. S. 1; *United States v. Reading Co.*, 226 U. S. 324. The Committee on Uniform Aeronautics of the Conference of Commissioners on Uniform State Laws while opposed to the policy of Federal regulation of intrastate air navigation nevertheless admitted, on the basis of the *Wisconsin Rate Case*, that in their opinion the Federal Government might regulate such air commerce if it deemed it a wise policy. *Handbook of the National Conference of Commissioners on Uniform State Laws* 1925, 320-1. In *United States v. Sampson*, 252 U. S. 465, the application of the commerce clause to transportation not involving any commercial element was fully sustained.

17. *La Vengeance*, 3 Dallas 297; *The Sally*, 2 Cranch 406; *the Betsy and Charlotte*, 4 Cranch 442.

18. *In re Reinhardt*, 222 N. Y. 115.

19. *The Atlantic Transport Co. v. Imbroock*, 234 U. S. 332; *Benedict on Admiralty*, 4th Ed., §231.

20. *The Sarah*, 8 Wheaton, 391; *United States v. Winchester*, 99 U. S. 372; *Union Insurance Co. v. United States*, 6 Wall. 759; *Morris v. United States*, 8 Wall. 507; 403 Cans of Frozen Egg Product, 226 U. S. 172.

the local fair market value. The power of Congress to appropriate for such purposes hardly seems open to attack.<sup>21</sup>

### Navigable Airspace

The Air Commerce Act of 1926 provides that airspace above the minimum safe altitude of flight prescribed by the Secretary of Commerce in the air traffic rules shall constitute navigable airspace and shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of the Act.

This provision does not attempt to settle to what extent the maxim that "He who owns the land owns to the Heavens above and to the center of the earth," is law. The provision merely asserts a right of freedom of navigation superior to the right of the owner of the subjacent land to use the airspace for conflicting purposes. This is analogous to the public right of freedom of navigation over navigable waters of the United States regardless of the ownership of the submerged soil or shore. The primary source of power to impose such an easement is the commerce clause. Whether the highway is provided by nature, as in the case of water and airspace, or by man, as in the case of roads, the power of Congress is the same.<sup>22</sup> The Supreme Court has persistently regarded the right of the owner of the shore or submerged lands as being limited by the superior rights of the whole people. Consequently, the States may assert their rights against the individual in the interest of navigation and the Congress, since the States have delegated to it the power to regulate commerce, may impose its superior right on either State or individual in the interests of navigation.<sup>23</sup>

The only decisions heretofore rendered in this country as to the ownership of airspace are two—one by a State District Court in Minnesota and the other by the Court of Quarter Sessions of Jefferson County, Pennsylvania. Both courts recognized that air navigation is lawful and does not constitute a trespass.

The administration of the Act is with but few exceptions vested in the Secretary of Commerce, and it is interesting to note that Congress felt that this subject was of sufficient importance to provide for an Assistant Secretary of Commerce whose duty it should be to aid the Secretary in fostering air commerce and carrying out the provisions of the Act. Air commerce, which bears a close relation to the national defense, should make substantial progress under the efficient and sympathetic administration of the provisions of the Air Commerce Act of 1926.

NOTE: The author of this article is Mr. Frederic P. Lee, Legislative Counsel of the United States Senate.

In 1922, as Assistant Legislative Counsel of the House of Representatives, he was assigned by Congressman Winslow to prepare the original draft of his Civil Air Navigation Bill. Since then he has devoted much time and effort in assisting Members of both Houses of Congress in perfecting commercial aeronautical legislation and in solving the legal problems connected therewith.

21. Cf., Corwin, Spending Powers of Congress, 36 Harvard Law Rev. 548; Burdick, Federal Legislation, 8 Cornell L. Quar. 324 and note in 9 Cornell L. Quar. 50; Frothingham v. Mellon, 262 U. S. 447; United States Ex Rel Miles Planting Co. v. Carlisle, 8 App. D. C. 138; United States v. Realty Co. 163 U. S. 427.

22. Monongahela R. R. Co. v. United States, 148 U. S. 312, 349.  
23. South Carolina v. Georgia, 93 U. S. 4; Shively v. Bowlby, 152 U. S. 1; State of New Jersey v. Sargent, 46 Sup. Ct. 122; United States v. Holt State Bank, 46 Sup. Ct. 197.

### Calendar of Coming Events

- American Bar Association Meets at Denver, Colorado ..... July 14-15-16
- National Conference of Commissioners on Uniform State Laws Meets at Denver ..... July 6-12
- Western New York Bar Associations Meet at Buffalo ..... June 24
- Illinois State Bar Association Holds 50th Annual Meeting at Rock Island-Moline ..... June 24-25-26
- Maryland State Bar Association holds Thirty-fifth Annual Meeting at Atlantic City ..... June 24-25-26
- Wisconsin State Bar Association Holds Annual Meeting at Kenosha ..... June 24-25-26
- Wyoming State Bar Association Holds Annual Meeting at Sheridan ..... June 28-29
- North Carolina State Bar Association Holds Annual Meeting at Wrightsville ..... June 30, July 1-3
- Indiana State Bar Association Holds 30th Annual Meeting at Michigan City, Ind. .... July 8-9
- Montana State Bar Association Holds Annual Meeting at Great Falls Week of ..... July 5
- National Conference of Referees in Bankruptcy at Detroit ..... July 9-10
- Minnesota State Bar Association Holds Annual Meeting at Duluth ..... July 13-14-15
- Commercial Law League Holds 1926 Convention in San Francisco in Week Beginning ..... July 19
- Washington State Bar Association Holds Annual Meeting at Big Four Inn ..... July 29-30-31
- Michigan State Bar Association holds Annual Meeting at Benton Harbor ..... Sept. 3, 4
- California State Bar Association Holds Annual Meeting in Yosemite Valley .... September 8-10-11
- West Virginia Bar Association holds Annual Meeting at Martinsburg ..... Sept. 30-Oct. 1
- Missouri Bar Association Holds Annual Meeting at Kansas City ..... October 1-2

### The White Statue

Chicago, April 16, 1926.

To the Editor: Lawyers visiting New Orleans should not fail to see the memorial statue of Chief Justice White recently unveiled in front of the new court house. I do not remember ever seeing a sculpture-portrait in which there was so much of the man himself. It is a heroic figure of the Chief Justice in bronze, draped in the robe of the Supreme Court, holding a portfolio of opinions; perhaps some of those brilliant, powerful, epochal opinions which he thundered from the bench. The massive form and great dignity of the Chief Justice is there, the noble head, strong, yet gentle, human, kindly face, a truly great, beautiful, masterful figure.

The old lines came to mind:

"His life was gentle, and the elements  
So mix'd in him that Nature might stand up  
And say to all the world: 'This was a man!'"

This bronze figure, there in perpetuity, is not only worth seeing as a work of art, but truly an inspiration to the lawyers of America.

M. F. GALLAGHER.

# GERMAN CHIEF JUSTICE ON U. S. CONSTITUTION

President Walter Simons of the Reichsgericht Examines Our Constitution in Introduction to German Translation of Mr. Beck's Book on Constitution—Thinks Curtailing of Supreme Court's Power Would Be Deplorable—Holds German Judiciary Must Be Given Stronger Position if Republic Is to Survive

A CONTROVERSY has developed in Germany as to the nature of a Constitution. As in the early history of the United States, the contest is between those who regard the Constitution as little more than a code of law and, as such, amendable by the Legislature, on the one hand, and those who regard the Constitution as a higher obligation and only amendable by a largely preponderating vote, on the other hand.

The first view is largely held at Heidelberg, and its proponents there are: Professor Gerhard Anschutz; Professor Richard Thoma; Professor Alexander Count Dohna; Professor May von Rumelin, and Professor Walter Jellinek. Among those who take the contrary view and are contending for the peculiar sanctity of the Constitution, as compared with current laws, are the names of Geyerle, Wilhelm Kahl, Erich Kaufmann, Koellreutter, Rudolf Smend, Carl Schmitt and Heinrich Triepel and his pupils.

Everywhere throughout Germany the struggle between jurists as to the nature of a Constitution continues. Under these circumstances, peculiar interest has been given to a book, which has just appeared in Berlin with the imprimatur of Walter Gruyten & Co., of Berlin and Leipzig. It is a German translation by Dr. Alfred Friedmann, of the Berlin Bar, of James M. Beck's "Constitution of the United States." The book has peculiar interest to German readers because of an introduction which has been written for it by Dr. Walter Simons, President des Reichsgericht. In this introduction, the Chief Justice of Germany contrasts the Constitution of the United States with the German Constitution and reaches conclusions that are of interest, not merely to German readers, but to the American people as well.

## Chief Justice Simons' Introduction

The history of the origin and fundamental philosophy of the Constitution of the United States, by James M. Beck, former Solicitor General of the United States, is based on a series of lectures, which he first gave to English jurists in Gray's Inn and then to French jurists in the Sorbonne. His lectures were published in a book, of which there have been several editions in the United States. His present book is also of the greatest importance to German readers and not alone to those of the legal profession.

The great difficulties which preceded the origin of this marvelous work of human ingenuity of statecraft are most graphically described. The Constitution, which now for approximately 140 years, has shaped the political destiny of one of the most extraordinary and important nations in the history of the world, was not acclaimed by its mental originators to the extent one would have expected, considering its importance at the present time. The Constitution was the result

of compromises, which did not satisfy any of the conflicting parties. But the strong will of the American people to conserve its political unity, for which it had fought so hard, and the wise barriers, which were put into the Constitution by its founders to prevent too rapid or facile changes, have had this extraordinary result, viz., that provisions of an organizing nature, which were meant for a number of small communities of an entirely colonial character, bent on the safeguarding of their individual liberty, have proved sufficient for a nation with such a large population and covering half a hemisphere; a nation which has brought about the highest development of its industrial and commercial resources and, furthermore, now constitutes a world power of the first magnitude.

The American Constitution was formed in conscious opposition to the constitutions of the European comity of nations, as they then existed. In Europe the absolute power of the territorial princes had established itself as superseding the medieval and feudal caste régime. The free and brave colonists, who in the struggle against England had achieved their political independence, protested against feudalism, caste régime and absolutism. French emancipatory ideas came to the fore at the Convention at Philadelphia again and again. Rousseau's "Contrat Social" has never found a more splendid realization than in the Constitution of these British colonists, and Montesquieu's "division of powers" has never been put more consciously into practical effect. But the spirit which dominated in America the realization of these French ideas was very different from the one which appeared later in the French Revolution. It was not the Roman spirit of logical radicalism, but the Anglo-Saxon spirit of soberly taking into account what could be practically achieved—the spirit of compromise. Whoever has read Mr. Beck's book will be in a position to say of this contrast: The spirit of Washington and Franklin achieved the victory over that of Jefferson and Hamilton.

The origin of the various struggles for the Constitution lay in the strong desire for individual liberty in the hearts of the inhabitants of New England. They were just as convinced of the inviolability of their individual human rights as the representatives of the Third Etat were in the French National Assembly. But, notwithstanding this, they did not include an enumeration of their individual human rights in the final draft of their Constitution. They merely saw to it that, as far as possible, different barriers to the power of the state were laid down in the Constitution. The great political and economic dangers, which threatened the then young community of states in the 70s and 80s of the 18th century, forced the Fathers of the Constitution to found a powerful and independent executive, in order to hold together, as with iron bars, the state edifice formed out of so many different communities. That was the first significant compromise

of the Constitution—the combination of individual liberty with the power of the state.

Another problem was more difficult to solve, viz: the relative power of the large and small, the powerful and the weak, the densely and the meagerly populated colonies. These differences almost brought to naught the work of the Convention at the last moment, when, after having been accepted by the Convention of Philadelphia, the Constitution was laid before the various states of the confederation for ratification. On the one hand was the justified pride of the individual state, which had developed its individuality through long independent existence as a separate colony and was conscious of the part it had played in the wars of independence; such a state did not want to renounce its claim to have and to keep equal rights with every other state. On the other hand was the wish of the larger and mightier states to have their natural superiority also recognized by the Articles of the Constitution.

If this natural superiority were left out of consideration, the tie binding large and small together would very soon have been severed, for, in the long run, the large states would never have submitted to being overruled by a majority of smaller states. But, if the participating influence in the rights endowed by the Constitution to the large and the small states were distributed merely in proportion to the extent of their power, the small states would soon have considered themselves as overpowered and would have lost the common interest in the Constitution. This two-fold danger was, however, averted by the American people in their Constitution through the ingenious association of the principle of equality, such as is shown by the equal representation in the Senate, and the principle of proportionate power, as shown by the unequal representation in the House of Representatives.

This example is of the utmost importance for the world. A community of the large and small nations of the world, based on international law, is not feasible unless this expedient of the United States of America is followed in the community of nations. The combination of the two contradictory principles, such as is tried in the League of Nations, does not equal, as far as equity and practical applicability are concerned, the Constitution of the Union. For, whereas, in the Constitution of the Union, the Senate demonstrates the equality and the House of Representatives the inequality of the various states, just the opposite is the case in the League of Nations. The Senate, i. e., the Council of the League of Nations, incorporates the overwhelming power of the great powers, whereas the House of Representatives, the Assembly of the League of Nations, stands for the equality of the nations. In view of the supreme importance of the Council of the League of Nations, the constitution of this body demonstrates a unilateral and oligarchical character, which already is beginning to get on the nerves of those nations not represented in the Council.

It is of particular interest to the European reader to note in Mr. Beck's book the mode and methods by which the Constitution of the United States is understood to put certain barriers on the executive, as well as on the legislative power of the Union. As far as domestic policy is concerned, it is quite natural that the executive power should be limited by the will of the legislator. But, on the other hand, the method by which, in the foreign relations of the nation, the President can be restrained by the Senate is typical of the American Constitution. The history of the World War has shown that the methods providing for this check

do not always suffice. But how strongly the Senate influences the government of the United States, as regards its negotiations with foreign powers, every country has learned to realize that has concluded treaties with the United States and has seen agreements already reached becoming jeopardized by subsequent misgivings on the part of the Senate.

The nucleus of Mr. Beck's book is taken up with his description of the federal jurisdiction. This jurisdiction he describes as the "balance wheel" in the machinery of the Constitution and, in reality, the fact that the Constitution has remained the unshakable foundation of the political existence of the United States during their long and changeable history seems to be due to the function of the Supreme Court. Such a part it would not have been possible for a judicial body to play if the Supreme Court had not been placed on a fully equal basis with the legislator and the executive; on an equal, but not superior basis. For even the Supreme Court is not entitled to declare a law null and void, or to prescribe to the executive; the Supreme Court is merely in a position in each individual case, to deny to a measure or law, which it considers contrary to the Constitution, its effectiveness and practical applicability. This, however, suffices to destroy the very foundation of all laws which are contrary to the Constitution and to make them practically inapplicable. Thus, the Supreme Court is, legally speaking, the conscience of the American people. Thus it has acquired the extraordinary position which is granted it by the American people to the present day.

This position, however, is no longer disputed, partly owing to the extraordinary speed with which economic and social conditions of the Union have developed within the last decades. A prophecy was made long ago that the American Constitution would only suffice for the life of the nation as long as in its immense territory there still remained unpopulated areas suitable for colonization, because only thus long would the conditions last under which the Constitution was made. Herein lies certainly some truth. When the pressure brought to bear by the members of a human community upon each other cannot be alleviated by the withdrawal of part of its members to unpopulated areas, conditions in the United States will more and more resemble those of over-populated Europe. But it seems to me that, from the point of view of constitutional law, there is so far little effect to be noticed by the change in the colonization conditions of the United States.

Another phase of modern development seems to me to be of much more vital importance, and that is the congestion of the population in the industrial and commercial centers of the large cities and the development of mass production, which standardizes not only the product, but also the producer. This revolution in economic conditions has necessarily led to an entirely different social stratification from the one which confronted the authors of the Constitution.

The colonies of New England were, at the time of the War of Independence, a mixture of agrarian and early capitalistic formations. The era of early capitalism played a decisive part in the formation of their political status. This explains why the Supreme Court has frequently adjudged legal measures unenforceable as contrary to the Constitution, when these measures have aimed at harmonizing existing laws with the social requirements of modern times, which tend to curtail the development of capitalism. Consequently the conflict arose between the Supreme Court and the ele-

ments of the social evolution which has taken place in the United States. The Supreme Court is reproached with being somewhat reactionary and unsocial, and there is a growing movement in the United States to do away with, or to curtail, the right of control on the part of the Supreme Court over the legislative bodies.

I think that it would be deeply deplorable, in the interests of the healthy progress of the United States, if this movement were crowned with success. If you take the balance wheel out of the machine, the running of the machine will soon become irregular and its inner mechanism will gradually go to pieces. If this social movement, which is not a victorious one in the entire world, is also successful in the United States, the resistance on the part of the Supreme Court could be broken by a change of the Constitution—a change for which the Fathers of the Constitution have already provided. But the road thereto is more difficult and unapproachable than the one provided by the Constitution of Weimar. However, it will not be difficult for a largely preponderant movement of the people to take that road. It seems to me a proof of the deep, statesmanlike, political wisdom of the Convention of Philadelphia that, while they laid the way open for a step of this kind, they made it hard to take, for thus they avoided delivering the Constitution of the United States to the ever-changing majorities of public opinion and of its representatives in Congress.

James M. Beck is a friend of Great Britain and France, and has clearly expressed this in his introductory remarks to the English and French editions of his book. He is no friend of Germany. As representative of the idea of right, he deeply felt the violation of the neutrality of Belgium by Germany. At the beginning of the World War, a friend of mine sent me an article from Philadelphia which Mr. Beck had published, concerning this violation of neutrality in the *Philadelphia Public Ledger*, under the title, "Belgium versus Germany," in which he discussed this conflict in international law in the form of a legal proceeding. His verdict was against Germany. Notwithstanding this, I think that Mr. Beck, by authorizing the German translation of his book, has done the German people a real act of friendship, for in his book he shows us, as in a mirror, the political tasks confronting us and our own republican problems. Germany and the Weimar Constitution can learn many an important lesson from Mr. Beck's book.

I, as the head of the Supreme Court of Germany, have, by reading Mr. Beck's book, come to the conclusion, in the first place, that our Republic cannot continue to exist, if the power of the judiciary, as compared with the legislative and executive powers, is not given a stronger position and greater jurisdiction than heretofore. The foundations in this respect have been laid by the Constitution of Weimar; they need only be developed. But the fact that our Parliament, year after year, enacts laws, which change the Constitution, without even realizing the changes thereby enacted, and that the executive resorts to emergency measures, for which in many cases there is no foundation in the Constitution, presents a condition which should not be allowed to continue further. The German people should have such respect for their own will as to the form of state—the will which found expression in the decisions of their National Assembly in Weimar—that they should not allow their representatives lightly to shake, by their legislative measures, their will, as expressed by the Constitution they made. Only

a people which respects its own will can expect that this will also be respected by other nations.

After the social evolution which we have gone through, no sensible man can believe that we have found the final form of our political existence. But the search for this form should not develop into hasty experiments and in attempts at "coup d'états," amounting to high treason. We should have more respect for those men who succeeded, under incredibly difficult conditions—confronting both pressure from abroad and peril from within; confronting the demands of our enemies and the conflict of the various parties in our own people—in safeguarding our unity in a dignified Constitution. We should, therefore, approach the amendment of what they did only with great circumspection and the careful consideration of the necessity of such a change. In the last stand, after all, it is the people, who are living under a Constitution, who count, not the Articles of the Constitution. The perpetual desire to serve the welfare of all and to interpret the Constitution in this spirit will help us surmount many a clause embodied in the Constitution, which already today we consider as unfortunate.

How a Constitution can be adjusted to the necessities of time, without formally changing the Constitution, can be seen from the difference between the clause of the American Constitution with regard to the election of the President and the practical application of this clause. The mode of election was originally intended as a complicated indirect election within the various states, but therefrom developed the decision as to the selection of candidates by the great national parties, a decision with which the voters have to conform.

If the German people, in the difficult years to come, prove themselves capable of a similar capacity of adaptation and a similar tenacity in retaining their conditions of life, as shown by the American people in similarly difficult conditions, Germany can be saved from its present political, economic and social condition of danger.

DR. WALTER SIMONS.

Leipzig, January 24, 1926.

### Quick Divorce in Sonora, Mexico

The State of Sonora, Mexico, recently enacted a law providing for divorces by mutual consent of the husband and wife, according to information furnished by an attorney of Nogales. The proceeding consists of a petition, or complaint, in Spanish, signed by both parties, to which are attached a verified copy of the certificate of marriage and an original agreement providing for minor children and disposing of community property, if any. After the petition and attached documents are filed, the court cites the parties to a meeting of conciliation. At this meeting one of the parties should appear in person and the other may be represented by power of attorney. If there is no reconciliation at the meeting, or within fifteen days thereafter, the parties by joint petition ask for judgment. The judgment, after being declared final, is published once only in the Official Paper of the State of Sonora and certified copies are issued to the parties.

The time required from the filing of the complaint to the publication of judgment is about forty days. There is no residence requirement, and the parties are required to be present only at the meeting of conciliation.

## FINAL ARRANGEMENTS FOR DENVER MEETING

Elaborate Preparations Being Made by Denver Bar to Give Delegates and Their Ladies Opportunity to See Natural Beauties of Vicinity—Final Program for Regular Meeting  
—Programs of Sections and Affiliated Bodies—Post Convention Tours  
Being Planned

THE Denver lawyers are making elaborate preparations to give their visiting brothers and the ladies accompanying them an opportunity to see the mountains within reach of Denver under the most advantageous circumstances. With this in mind a series of trips for Friday and Saturday and one two-day expedition for Saturday and Sunday have been arranged.

Denver stands on the plains at the Eastern margin of a great range of enormous mountains, into which automobile roads and boulevards reach Northwest, West and Southwest. The development in recent years of adequate highways has almost superseded the old method of seeing the mountains near Denver by Railroad, and automobile transportation is therefore planned almost entirely.

Because of the impossibility of routing an indefinite number of people over any one mountain road, the entertainment has been divided into a series of trips, each of which will accommodate a limited number. The visitor will be given an opportunity to select the route he desires within this limitation. Because of the complicated arrangements necessary, a positive choice will be required early in the week.

On Friday afternoon an opportunity will be given to the visitors either to take a short trip around the boulevards within the City limits, or to see the lower boulevard loops in the mountain foothills. Those who desire to take the mountain trips will be taken on one of two sixty-mile routes through the chain of roads and small parks which constitute the Municipal Mountain Park System. These trips each will consist of about a sixty-mile drive through foothill canyons and mountain resorts, such as Lookout Mountain, Bear Creek Canyon, Turkey Creek Canyon, and the cross roads connecting these canyons at an elevation of about 8,000 feet.

These foothill trips will take about three hours, and will consume practically the whole time between luncheon on Friday and the Annual Dinner Friday evening.

The shorter city trip that afternoon, for those who do not care about seeing the foothills, will show the visitors the boulevards and parks within the city, which in themselves have given Denver fame as a beautiful residence locality. Tea will be served at the great military hospital on the plains east of the City.

On Saturday, July 17th, the visitors will be given the choice of five different routes into the higher mountains. Four of these are all-day motor trips with luncheon en route at some spot along the road. The fifth is a two-day motor trip through what is called the Rocky Mountain National Park Grand Circle, in the course of which the traveler

crosses the Continental Divide twice at an altitude of more than two miles above the sea, and stays all night on the headwaters of the Colorado River at Grand Lake, or elsewhere in that locality.

Because of transportation and hotel limitations, this trip will be limited to 200, and the first applicants will be accepted. The other trips are shorter and of equal interest. One carries the visitor to Estes Park, through the mining and glacier locality in Boulder County, stopping for luncheon at one of the Estes Park Hotels and returning to Denver by another route.

Those who have no intention of visiting the Rocky Mountain National Park and are unable for any reason to take the two-day trip, should seriously consider this alternative.

Another alternative trip carries the visitor into what the residents of Denver generally agree is the most interesting one-day expedition from that city. This trip carries the visitor in automobile from Denver through Cold Creek Canyon, to Rollinsville, roughly paralleling the route of the Moffat Railroad for the first forty miles. From there the automobiles will turn south and carry the visitor through the famous Pike's Peak gold camp region, visiting such mining towns as Central City and Black Hawk, which were the first large settlements in Colorado, but are now almost ghostly cities deserted on the mountain tops. From these mining camps, the road leads down the spectacular Virginia Canyon Route, which was originally the scene of much early Colorado bandit history. The visitor returns to Denver through Idaho Springs and the Mountain Park District.

This trip is one of the most startling and historically interesting mountain trips in the world, and the visitor who is likely to be nervous among mountain precipices, however, safe the road, should choose a milder alternative, as the road is likely to be both long and uneasy to those unfamiliar with this sort of travel.

Another alternative for Saturday is a much easier and more familiar all-day trip by railroad to Colorado Springs. The visitors buying round-trip tickets to Denver should have the selling office add the coupon to Colorado Springs and take an opportunity to visit that city, but those who have no other plans to do so, may find this hurried visit and return to Denver worth while. A short time will be allowed for a drive around the city.

The last of the alternatives for Saturday is an expedition to Summit Lake. This trip partly duplicates the Friday afternoon foothill trips. The view from the Denver Civic Center, towards the mountains, printed elsewhere in the JOURNAL, shows immediately West of Denver the great bulk of Mt. Evans, which is one of the highest mountains in the



Scene on one of the automobile tours planned by Denver Lawyers for delegates to American Bar Association Meeting and their ladies. Its local name is Wildcat Point on Lookout Mountain. Courtesy Denver Tourist Bureau

West, and even slightly exceeds the height of Pike's Peak.

The City is constructing an automobile highway to the summit of this peak, but at present it ends at an altitude of 13,500 feet, far above the timber line, and somewhat lower than the peak itself. Those who choose this trip, may start somewhat later in the morning than in the case of the other mountain trips, driving through the boulevards to Summit Lake and returning to Denver in the afternoon. This is the easiest and shortest of the Saturday automobile trips, but it carries the visitor to very great altitudes, and some consideration should be given to that.

Each of these trips, as already explained, must for one reason or another be limited in number, and the Committees have to ask their visitors on reaching Denver to act promptly and positively in communicating their choices to headquarters. Consideration should be given to choosing the Friday and Saturday trips so that the same territory will not be revisited.

The Colorado Committees will afford every facility so that visitors may consult with local lawyers as to the advantages and disadvantages of the various trips. Even visitors who have spent many months in Colorado will be able to find trips which carry them into regions they have never

visited, as there is great variety provided by the arrangements which have been made.

It must be remembered that while the sun is hot on the prairies in summer, the nights are cool in Denver throughout the year. All the automobile trips on Saturday will carry the visitor into altitudes one and one-half miles or more above the sea, and medium weight clothing with the addition of a warm wrap will be found essential. Nearly all the mountain trips will carry the visitor to the edge of perpetual snow.

Those who are more interested in sports than in sightseeing have not been forgotten. Special golf privileges are arranged for at all the Denver Clubs, and the Committee will be on duty to organize a Golf Tournament, if sufficient interest is shown, and to provide partners and facilities for those who want to play.

There is some excellent but difficult trout fishing within a few hours travel from Denver. If members interested in this sport will address the Denver Headquarters before they arrive, a few privileges on private preserves can be arranged, but advance notice should be given.

On Friday afternoon, a special Children's Party has been arranged at Elitch's Gardens. This resort is an old and famous Denver institution, which for a generation has been the favored spot for family picnics and high grade children's parties. In order

to release the mothers and families of the visiting children for the afternoon, a corps made up of the wives of the younger Denver lawyers will take individual charge of the children entrusted to them, and will see that they spend the afternoon safely and happily. They will be returned to the headquarters in time for dinner. The Committee especially asks families bringing children between the ages of six and fifteen years not to take them on the mountain trips on Friday, but entrust them to the Denver hostesses for the afternoon.

## Revised Program of the Association

**Wednesday, July 14, at 10 A. M.**

*Denver Auditorium*

Addresses of Welcome.

Annual Address by President of the Association.

Announcements.

Report of Secretary.

Report of Treasurer.

Report of Executive Committee.

Nomination and Election of Members.

(State delegations will meet at the close of this session to nominate members of the General Council, and to select nominees for Vice-President and Local Council for each State.)

**Wednesday, July 14, at 2:30 P. M.**

*Denver Auditorium*

This session will be a joint session of the American Bar Association and the Colorado State Bar Association.

Address by Henry A. Dubbs of Colorado: "The Unfolding of Law in the Mountain Region."

Symposium—Enforcement of the Criminal Law:

Guy A. Thompson, St. Louis, Mo.

(Second speaker to be announced later.)

Richard Washburn Child, New York City.

**Wednesday, July 14, at 8 P. M.**

*Denver Auditorium*

Address by Hon. James M. Beck. (Subject to be announced later.)

9:30 P. M. President's Reception—Cosmopolitan Hotel.

**Thursday Morning, July 15**

**A. M.** *Broadway Theatre*

10:00 Statement of progress of work of the American Law Institute, by the President, George W. Wickersham.

*Reports of Sections and Committees*

(The names of the respective chairmen are given.)

*Sections*

10:20 Criminal Law, Oscar Hallam, St. Paul, Minn.

10:30 Comparative Law Bureau. William M. Smithers, Philadelphia, Pa.

10:40 Judicial Section. James I. Allread, Columbus, Ohio.

10:50 Legal Education. Silas H. Strawn, Chicago, Ill.

11:00 Patent, Trade-Mark and Copyright Law. Arthur C. Frazer, New York, N. Y.

11:10 National Conference of Commissioners on Uniform State Laws. George B. Young, Montpelier, Vt.

11:20 Public Utility Law. William Chamberlain, Cedar Rapids, Iowa.

11:30 Conference of Bar Association Delegates. Josiah Marvel, Wilmington, Del.

*Committees*

11:40 Professional Ethics and Grievances. Thomas Francis Howe, Chicago, Ill.

11:50 Use of the Word "Attorney." William H. Lamar, Washington, D. C.

**P. M.**

12:00 Supplements to Canons of Professional Ethics. Charles A. Boston, New York.

12:10 Commerce, Trade and Commercial Law. Province M. Pogue, Cincinnati, Ohio.

12:20 Practice in Bankruptcy Matters. Simon Fleischmann, Buffalo, N. Y.

12:30 Publicity. Walter H. Eckert, Chicago, Ill.

12:40 Publications. Grenville Clark, New York.

12:50 Membership. Frederick E. Wadhams, Albany, N. Y.

1:00 Adjournment.

**Thursday Afternoon, July 15**

*Broadway Theatre*

*Committee Reports*

(The names of the respective Chairmen are given.)

**P. M.**

2:00 American Citizenship. F. Dumont Smith, Hutchinson, Kans.

2:15 International Law. James Brown Scott, Washington, D. C.

2:25 Law Enforcement. Charles S. Whitman, New York City.

2:35 Removal of Government Liens on Real Estate. John T. Richards, Chicago, Ill.

2:45 Jurisprudence and Law Reform. Henry W. Taft, New York City.

3:00 Federal Taxation. Charles Henry Butler, Washington, D. C.

3:15 Salaries of Federal Judges. A. B. Andrews, Raleigh, N. C.

3:30 Symposium—Greater Efficiency in Judicial Procedure.

1. Robert G. Dodge of Boston, Mass. "Judicial Council."

2. Edson R. Sunderland of Ann Arbor, Mich. "Exercises of the Rule Making Power."

3. Roscoe Pound, Cambridge, Mass. "The Canons of Procedural Reform."

5:00 Memorials. William P. McCracken, Jr., Chicago, Ill.

**Thursday, July 15, at 8 P. M.**

*Denver Auditorium*

Address by Thomas J. Norton of Chicago, Ill. "National Encroachments and State Aggressions."

Address by Duncan Campbell Lee of London, England. "Recent Changes in English Law of Property."

**Friday Morning, July 16**

*Broadway Theatre*

*Committee Reports*

(The names of the respective Chairmen are given.)

**A. M.**

10:00 Revision of Federal Statutes. Paul H. Gaither, Greensburg, Pa.

- 10:20 Uniform Judicial Procedure. Thomas W. Shelton, Norfolk, Va.  
 10:30 Noteworthy Changes in Statute Law. Joseph P. Chamberlain, New York City.  
 10:40 Admiralty and Maritime Law. Charles C. Burlingham, New York City.  
 10:50 Change of Date of Presidential Inauguration. Levi Cooke, Washington, D. C.  
 11:00 Legal Aid. Reginald Heber Smith, Boston, Mass.  
 11:20 Law of Aeronautics. William P. MacCracken, Jr., Chicago, Ill.  
 11:30 Incorporation of American Bar Association. John B. Corliss, Detroit, Mich.  
 11:40 Insurance Law. William Brosmith, Hartford, Conn.  
 12:00 Nomination and Election of Officers. Miscellaneous Business.  
 Adjournment *sine die*.

**Friday, July 16, at 2 P. M.**

Motor Trip. (Details announced on page 380.)

**Friday Evening, July 16, at 7 P. M.**

Annual Dinner of members of the Association, ladies and guests—Denver Auditorium. Speakers to be announced later.

**Saturday, July 17.**

All-Day Motor Trip to points of interest, as guests of Colorado and Denver Bar Associations.

**Conference of Bar Association Delegates  
 Eleventh Annual Meeting, Denver, Tuesday,  
 July 13, 1926**

**Forenoon Session—10:00 A. M.**

Opening Address: Vice-Chairman, Josiah Marvel.

**Reports of Committees:**

Conciliation and Small Claims Procedure: Reginald Heber Smith, Chairman.

Co-operation Between the Press and the Bar: Julius Henry Cohen, Chairman.

Requirements for Admission: Walter F. Dodd, Chairman.

State Bar Organization: Clarence N. Goodwin, Chairman.

Judicial Selection: Irvin V. Barth, Chairman.

Reports by Delegates on Bar Association Accomplishments.

Appointment of Nominating Committee.

**Afternoon Session—2:00 P. M.**

Special Topic: The Judicial Council and the Rule-Making Authority.

Reports of Delegates—Continued.

Miscellaneous New Business.

**Section of Criminal Law**

The Criminal Law Section will hold two sessions.  
 (Continued on Page 412)



Denver's Civic Center with view of snow-capped mountains in the distance. Courtesy Denver Tourist Bureau.

## CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

### Among Recent Books

HUGHES, CHARLES E. *The Pathway of Peace. Representative Addresses Delivered During His Term as Secretary of State (1921-1925)*. New York. Harper & Brothers. 1925. Pp. 329. \$4.00. This book presents in attractive form what Mr. Hughes evidently considers as the most significant of his public addresses during his term as Secretary of State. The speeches are grouped in four divisions. Seven are classed under *Foreign Policy* and four under *Pan American Policy*, and all of them comprise statements of importance because uttered by our then Secretary of State. The third division includes four long addresses on *Legal Subjects* worthy of remembrance because uttered by an ex-Justice of the Supreme Court and one of the leaders of the American bar. Finally, seven speeches are classed under *Various Subjects*; and, of these, three are of special interest because they treat of the organization and functioning of the Department of State.

Of all the speeches, the most historic is the address delivered by Mr. Hughes on the 12th of November 1921 when taking the presidency of the Washington Conference on Limitation of Naval Armament. It was in this address that Mr. Hughes astounded diplomats by frankly proposing to stop construction of all new battleships, to scrap a large number of old ships, and to limit the tonnage of the Great Powers for the next ten years to the celebrated 5-5-3 ratio. At the time, this speech impressed his contemporaries as a stroke of unsurpassed boldness. But the historian of the future, instead of emphasizing the boldness of Mr. Hughes, will probably stress the fact that he lost a part of his golden opportunity by a certain timidity, or at least, over-caution. Every day, it becomes more apparent that America's enormous sacrifice in capital ships in 1921 should have been compensated by some sacrifice on the part of Great Britain and Japan in the matter of cruisers under ten thousand tons. Only the future will show whether the United States will be compelled to expend another huge sum running into millions of dollars in order to bring our light cruisers up to superiority over Britain and Japan before we again have the opportunity to persuade these states to adopt a limitation in this important field of naval competition.

The second speech in historical importance is undoubtedly the one delivered before the annual meeting of the American Historical Association at New Haven on the 29th of December 1922. At first blush it would appear that a more or less technical address delivered before a didactic society would not have a profound effect upon world politics. Before such a body, Mr. Hughes would not be expected, like a certain British ambassador, to recite pages of the *Encyclopaedia Britannica*; but he would be expected to touch

upon foreign policy with a somewhat retrospective view. Indeed, as Mr. Hughes himself wittily remarked, if a responsible cabinet officer is tempted to play the role of historian, the farther back he goes the safer he is. But the address was not even entirely retrospective. It was saved from burial in the blue-bound archives of the historical association by a paragraph preceding the peroration, referring in veiled language to the break-up of the London conference between the British and French premiers when M. Poincaré threatened to settle the German reparation problem by seizing the Ruhr. At this gloomy moment, the American Secretary of State hinted that France and Great Britain would do wisely if they stopped bickering over Germany and referred to a commission of experts the task of ascertaining just what Germany was able to pay.

These noble words were spoken at the right time, but unfortunately not in the right place. Naturally, M. Poincaré gave little heed to what the American Secretary of State majestically uttered before a society of college professors; and, brushing aside international law and the Treaty of Versailles, he intensified the hatreds of Europe and prolonged the period of post-war chaos by invading Germany with a hundred thousand soldiers. We cannot say that the reconstruction of Europe would have been more rapid if a more co-operative spirit had ruled our foreign policy in the period following the World War, but at least we would have had the satisfaction of playing a more manly part.

The same regrets for the weakness of our foreign policy follow a reading of Mr. Hughes' speech delivered before the Canadian Bar Association in 1923. The address is entitled "*The Pathway of Peace*," and gives its name to the collection of speeches now published in book form. Delivered at a time when the League of Nations and the Permanent Court of International Justice had already proved their usefulness in settling international disputes it might have been expected that the Secretary of State would have given honorable mention to these agencies of peace. But far from it: with words that even at the time had a hollow ring, the Secretary advised the world to follow the example of America in settling disputes by a resort to arbitration; and not one reference, not even remotely, was made to the greatest experiment in arbitration ever undertaken in the history of mankind.

The studied ignoring of the League of Nations and the Permanent Court of International Justice is the most significant characteristic of the Secretary's speeches. And indeed, if we may again refer to the future historian, it is probable that this irritating individual will decorate his pages with some ironical sentences concerning the ludicrous efforts of the State

Department in the first two years of Mr. Hughes' term to avoid all contact with these institutions. During the controversy over giving the League supervision over the opium trade, this policy went so far as to cause Mr. Hughes to address his correspondence with the Secretary-General at Geneva in a round-about fashion through the Dutch foreign office instead of corresponding directly with Sir Eric Drummond! So far as Mr. Hughes was concerned, the Sectarial had absolutely no existence. On occasions when the League courteously inquired of the Washington Government whether it cared to accept its opportunities under the Covenant to participate in various organizations, the polite inquiries of the political agency of nearly all the civilized states in the world were rudely ignored. This disregard of international comity was carried so far that in 1921 the State Department intentionally neglected to transmit to the American representatives on the panel of the old Hague Tribunal the request of the League for nominations to the Permanent Court of International Justice. The request had been sent to our State Department for transmission to the American jurists only as an act of courtesy to the United States. History records few instances of such unwarranted boorishness on the part of a great nation.

None of the state papers included in the volume under review deal with the famous controversy with Hamilton Holt over the Manifesto of the Thirty-One Republicans. This manifesto, issued on the eve of the presidential election, and signed by Mr. Hughes and thirty other prominent Republicans gave positive assurance that Mr. Harding if elected president would bring the United States into the League of Nations. Because of this assurance, thousands of League supporters in the Republican Party voted for Mr. Harding; and, after the election, when Mr. Hughes accepted the first post in the cabinet, it was naturally expected that he would translate his promise into action. No doubt, Mr. Holt seriously embarrassed the Secretary of State by his open letter published in the *Independent* on the 6th of August 1921 demanding why no step had been taken to carry out the pre-election pledges. But Mr. Hughes' reply was a palpable evasion of the issue; and consequently, it is to be sincerely hoped that when Mr. Hughes writes his memoirs he will give the proper explanation for this disregard of a solemn pledge. He owes it to his own reputation to do so, for otherwise an unflattering construction of his failure to act will prevail in the annals of our country.

By the year 1923, the fruitlessness of our isolation policy became so apparent that the Harding Administration decided to venture at least as far as adherence to the Permanent Court of International Justice. On the 27th of April, Mr. Hughes justified this step in a lucid address before the American Society of International Law. In this speech, we find the Secretary at his best. Skillfully he took the role of special pleader; and perhaps in the multitude of speeches on the world court in the past five years, this address will stand out conspicuous for its terse expression, admirable logic, and convincing array of argument. It is doubtful whether the four issues which he selected as the basis of his argument could have been more aptly chosen, or the conclusions more clearly developed.

Lack of space forbids further comment on the historic addresses assembled in the book under review. The policy of refusing recognition to Russia is explained in one of Mr. Hughes' typical expressions on

this subject. The State Department's interpretation of the Monroe Doctrine is shown by three addresses on Latin-American relations. The official attitude toward the project of codification of international law as recognized in the Americas is displayed in an address before the Pan-American Union. The reorganization of the Department of State is touched upon in several addresses.

In all of these discussions there is much to praise and, unfortunately, much to blame. But leaving aside criticism of policy there is one characteristic of the addresses which is truly to be deplored, namely their partisan character. It is true that the Secretary was under the necessity of speaking for a government controlled by one of the great political parties. But Mr. Hughes almost always attempted and usually succeeded in assuming the guise of great judicial, almost majestic, impartiality. But impartial, he was not. A fair consideration of the achievements of his predecessors is lacking in every speech he uttered and in every state paper he wrote. More than adequate recognition is given to the work of Hay, Root, Roosevelt and other Republican statesmen; but not a scintilla of praise is meted out to any Democratic statesman, past or present. It is true that the first Secretary of State under Woodrow Wilson was as innocent of international law as a newborn babe, and might well merit the contemptuous silence of a great constitutional and international jurist; but surely the "pathway of peace" has been rendered more straight by the arbitration treaties of 1913 and by the provision of the Covenant of the League for the creation of the Permanent Court of International Justice, and it would have been a gracious condescension to have recognized occasionally these contributions of statesmen outside the Republican Party. Arrogance does not promote goodwill among individuals as well as nations, and the truly judicial mind will not neglect the virtues of even the most detested of adversaries. KENNETH COLEGROVE, Northwestern University.

*Sumptuary Legislation and Personal Regulation in England* by Frances E. Baldwin. Baltimore: Johns Hopkins Press. Pp. 282. \$2.50. In this book are described the governmental attempts to control the food, wearing apparel, and amusements of Englishmen from the Plantagenet times up to the abandonment of sumptuary legislation in the early Stuart days. The book is essentially of a descriptive, not an analytical, nature. Thus the successive statutes (almost all dealing with wearing apparel) are separated by minute descriptions of what actually was worn. Interesting suggestions, but only suggestions, are given of the motives lying back of some of the enactments: economic, to further home industry; political, to injure an opponent's trade (or the requirement that the men of Galway must shave their upper lips, to Anglicize them); social, to preserve class distinctions; and often, it would seem, just the pleasure of making another person do as he does not want to do. The strongest reaction one gets from this material is that it is a history of futility, one unenforceable law after another, one attempt after another to make a multitude of people forego innocent pleasures because a few are likely to be intoxicated by their freedom. It is a matter of satisfaction to know that we are living in an age which has had the full benefit of this painful lesson.

One of the group of rather widely known American texts has recently made its appearance in a new (third) edition, J. N. Pomeroy's *Specific Performance*

of Contracts (Albany: Banks & Co. Pp. xl, 1045. \$15.00.) Extended comment is unnecessary, as the text has been left absolutely unchanged (except for the addition of two brief sections) because, the editor states, its frequent citation in court opinions renders it important to have the original work before us. Even such changes as the second edition made in the footnotes have been suppressed, and all the new material has been gathered into a secondary and wholly separate

system of notes. These are very voluminous and attempt a complete citation of authorities since the first edition. While they are in the main case citations, these notes also contain a large amount of interpretive text. The new edition is simply an effort to bring down to date a book which has already been assigned its definite position in the hierarchy of the law library, not an effort to alter that position.

E. W. PUTTKAMMER.

## CURRENT LEGISLATION

### New York Criminal Laws of 1926

By J. P. CHAMBERLAIN AND ABBOT LOW MOFFAT

ALTHOUGH few legislatures were in session this year, a possible trend of legislation was foreshadowed by the passage, in New York, of a number of laws in response to the wide-spread agitation that criminal justice be made more effective. These acts were prepared by a joint legislative committee,<sup>1</sup> authorized at the last session, in co-operation with judges, prosecutors, criminologists, and interested organizations throughout the state. Drafts of the bills were submitted in March with the Committee's report.

The report<sup>2</sup> stresses the changed conditions of modern life. The Committee felt that the entire Code of Criminal Procedure and portions of the Penal Law should be revised thoroughly and modernized, but believing that this was too large a task to be undertaken without more intensive study, it was committed to a State Crime Commission<sup>3</sup> which will report findings and recommendations to the Legislature before March 1, 1927. The Commission is an official body, with wide powers of investigation. It is to make a complete survey of all phases of criminal detection, procedure, and punishment, stressing, in particular, crimes of violence. It forms an integral unit in the campaign against crime urged by the unofficial National Crime Commission.

There were, however, certain patent weaknesses in the existing laws and practice which the joint legislative Committee felt needed immediate remedy.

From the point of view of the administration of the criminal law undoubtedly the most important of the New York acts is that providing for the establishment of a State Central Bureau of Criminal Identification<sup>4</sup> copied almost verbatim from a similar California statute.<sup>5</sup> The bureau will keep records of all persons convicted of felony within the state, records received from other states and countries, *modus operandi* cards, and other data needed in

criminal identification and detection. In addition, to the bureau will be sent daily the fingerprints of all persons arrested who, in the opinion of the arresting officer, are wanted for serious crimes or who are fugitives from justice. On receipt the files will be searched and any previous record at once discovered. So successful was the California bureau, the first established in this country, in disclosing professional criminals and in aiding police administration, that by 1926 seven jurisdictions had established similar bureaus.<sup>6</sup> Four of these were authorized last year,<sup>7</sup> and it may be that the impetus thus gained will result before long in the creation of a bureau in every state cooperating with those in other states and with the national bureau at Washington.

The most striking feature of the new laws is the evident realization by the Legislature that the professional criminal is a special problem. The intent to protect society not by reforming the recidivist, but by making it impossible for him to commit crime, is shown in two acts, one of which is unique.

In New York bail has never been a constitutional right, but in all cases of felony the courts have been authorized to use judicial discretion in granting bail.<sup>8</sup> In fact, however, it had become an almost universal practice to grant bail as a matter of course. The new law can be traced directly to disclosures by the Grand Jurors Association of New York County<sup>9</sup> which showed the ease with which professional criminals obtained bail and then not infrequently committed further crimes while so released.<sup>10</sup> It provides<sup>11</sup> that where a person is accused of committing a felony or one of a group of specified misdemeanors and offenses, and there is reason to believe that he has been previously convicted of a felony or twice convicted of one of the

1. Joint Legislative Committee on the Coordination of Civil and Criminal Practice Acts, Senator Caleb H. Baumes, Chairman. The Committee was popularly known as the Baumes Committee.

2. Leg. Doc. (1926), No. 84.

3. N. Y. L. 1926, c. 460.

4. N. Y. L. 1926, c. 702.

5. Calif. St. 1917, p. 1391, as amended by St. 1921, p. 1662.

6. Hawaii (1925, R. L. Nos. 1537-1540), Neb. (1921 C. St. Nos. 9942-9944), Ohio, (Gen. Code Nos. 1841.13-1841.21, as amended by L. 1923, p. 8), Mich. (L. 1925, No. 289), N. C. (L. 1925, c. 228), Okla. (L. 1925, c. 127), Vt. (L. 1925, No. 181).

7. Michigan, North Carolina, Oklahoma, Vermont.

8. N. Y. Code of Crim. Proc. No. 553.

9. Assoc. Grand Jurors, N. Y. County, Report, 11/16/25.

10. In 1924 111 persons, while out on bail awaiting trial for the commission of a felony, were arrested in New York City for subsequent serious offenses. Leg. Doc. (1926), No. 84, p. 9.

11. N. Y. L. 1926, c. 419.

specified misdemeanors or any two of them, the power to grant bail is vested only in judges of the supreme court, general sessions, and county courts. The misdemeanors enumerated are those which are typical of the professional criminal.<sup>12</sup> The law provides further, as conditions precedent to the granting of bail in any case where the accused is charged with a felony or one of the specified offenses, that he shall be fingerprinted, that the local files shall be searched, and that any record disclosed shall be submitted to the judicial authority admitting to bail.<sup>13</sup>

The other measure evidencing the same effort to protect the public from the recidivist is a re-sentencing act<sup>14</sup> copied from a West Virginia law.<sup>15</sup> It is designed to make effective the present sections of the penal law providing that a person convicted of a second offense of felony shall be imprisoned for not less than the longest term prescribed for a first conviction, and that one convicted of a fifth offense shall be imprisoned for life.<sup>16</sup> Under both these laws it has been held that the indictment must charge the previous offense which is often at the time unknown.<sup>17</sup> Under the act if at any time after sentence or conviction it is discovered that the prisoner has been previously convicted of one or more felonies, the district attorney must file an information against him accusing him of such previous conviction. On his admission that he is the same person, or on a jury determination that he is, the court shall sentence him as a second offender, vacating the previous sentence, and deducting all time actually served. In an opinion by Justice Hughes the Supreme Court has held the similar West Virginia statute constitutional.<sup>18</sup>

The pistol has been the principal factor in "the Crime Wave," and the pistol menace has been forging to the front as one of the chief problems with which the police authorities have to deal. Three international police conventions, representing forty-seven nations of the world, have gone on record as believing the control of the pistol to be of fundamental importance. More people are said to be shot to death in the United States by pistols than in all the rest of the world.<sup>19</sup>

New York State was a pioneer in seeking to control the use of such weapons, but as the mails are open to them, and as the laws of neighboring states are not so stringent, the New York laws have accomplished but little. Accordingly the Legislature has attacked the problem from a new angle. It is provided that imprisonment for committing a felony when armed with a pistol or certain other weapons shall be "double in duration that pre-

scribed" for the same felony when not so armed, and probation, suspension of sentence, commutation or compensation are forbidden, the prisoner being required to serve out the full term.<sup>20</sup>

Another change in penalty was caused by the startling increase in robberies, convictions for which more than doubled between 1920 and 1925.<sup>21</sup> From a maximum term of twenty years and no minimum for first degree robbery, the term of imprisonment is altered to a minimum term of fifteen and no maximum. At the same time the minimum term for burglary in the first degree is reduced from twenty years to fifteen.<sup>22</sup>

The report of the Committee while denying the necessity of a Criminal Court of Appeals or a judiciary reserve, both of which had been strongly urged, emphasized the need to have the wheels of justice turn less slowly. To this end laws were enacted abolishing as a matter of right separate trials for those jointly indicted,<sup>23</sup> reducing the period in which an appeal may be taken from one year to thirty days, as in civil cases,<sup>24</sup> and requiring that the defendant keep the appeal alive by arguing within ninety days instead of six months.<sup>25</sup>

Of similar intent is the proposed constitutional amendment providing that a defendant may waive jury trial in criminal cases, except where the penalty is death.<sup>26</sup> In Hartford, where the practice has existed for five years, about seventy per cent of such cases are tried without jury, while in the Criminal Court of Baltimore City in 1924 over ninety per cent of all cases were so tried. As it is estimated that a non-jury trial requires about a third of the time needed to try the same case with a jury, the disposal of cases should be very greatly accelerated.<sup>27</sup>

It is worthy of note that although few of these laws had serious opposition, only one of the three measures recommended by the joint Committee to aid the people in the prosecution of criminal cases, became law. This enactment changed the order of trial so that the opening address of the defense follows, as in civil cases, that of the prosecuting officer before any evidence is taken.<sup>28</sup> But a bill<sup>29</sup> which would have allowed the prosecuting officer to comment on the failure of the defendant to take the witness stand, although passed by the Senate, was defeated in the Assembly. And a measure<sup>30</sup> requiring the defendant to avail himself of a new plea, "not guilty on the ground of insanity," at the time of his arraignment, if he intended to rely on such defense, and providing further that any defendant so pleading should be confined in a state hospital for thirty days for observation, was vetoed by the Governor on the ground that the proposal was so radical a change from the present practice that it should receive the careful study of the new State Crime Commission.<sup>31</sup>

12. The misdemeanors and offenses enumerated are: illegally using, carrying, or possessing a pistol or other dangerous weapon; making or possessing burglars' instruments; buying or receiving stolen property; unlawful entry of a building; aiding escape from prison; interfering with a person by jostling or crowding him, or placing a hand in proximity of his pocket, pocketbook, or handbag; and unlawfully possessing or distributing habit-forming narcotic drugs.

13. See Moffat: "Taking Finger Prints Upon Arrest." XII A. B. A. Jour. 175 (March, 1926).

14. N. Y. L. 1926, c. 457.

15. W. Va. Code (Barnes 1923), c. 165, Nos. 2-4. The provision is very old, being derived from the Code of Va. 1860, c. 199, which in turn came from the Code of 1849, c. 198. See also, Mass. St. 1817, c. 176.

16. N. Y. Penal Law, Nos. 1941-1942.

17. People v. Rosen (1913), 208 N. Y. 169, 101 N. E. 595; People v. Schieth, (1910) 68 Misc. 207, 128 N. Y. Supp. 686.

18. Graham v. Va. Va. (1911) 224 U. S. 616, 32 Sup. Ct. 583.

19. Leg. Doc. (1926), No. 84, p. 14.

20. N. Y. L. 1926, c. 705.

21. Leg. Doc. (1926), No. 84, p. 17.

22. N. Y. L. 1926, c. 436.

23. N. Y. L. 1926, c. 461.

24. N. Y. L. 1926, c. 416.

25. N. Y. L. 1926, c. 464.

26. A. Int. 1623.

27. Leg. Doc. (1926), No. 84, p. 19.

28. N. Y. L. 1926, c. 417.

29. S. Int. 1180.

30. A. Int. 1613.

31. N. Y. Times, 5/13/26.

## AMERICAN BAR ASSOCIATION JOURNAL

### BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief.....	Chicago, Ill.
HORACE KENT TENNEY.....	Chicago, Ill.
JOHN B. CORLISS.....	Detroit, Mich.
CHESTER I. LONG.....	Wichita, Kan.
HERMAN OLIPHANT.....	New York, N. Y.
R. E. LEE SANER.....	Dallas, Texas

Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, \$3 a year. To those who are members of the Association (and so of the Section), the price is \$1.50, and is included in their annual dues, \$6. Price per copy, 25 cents.

JOSEPH R. TAYLOR, MANAGER

Journal Office: Room 1119 The Rookery Bldg., 209 South La Salle St., Chicago, Illinois.

### "ONLY WHEN ORGANIZED"

The failure of legislatures to pay much attention to demands that have not an organized backing is frequently criticised, but after all, it is not without a certain logic. It is natural for those who desire things to associate for the purpose of securing them. It is also natural for things which are worth securing, for ideals that are worth attaining, to appeal sufficiently to the imaginations of men to cause them to form groups animated with a common purpose. When, therefore, a demand is presented which embodies an idea which has not been able to externalize itself in the form of a supporting organization, it is not unnatural for the average practical legislator to question, first, the desire of many people to see it realized, and, secondly, the worth of the idea itself. Hence failure or at least delays.

Neither before legislative bodies nor elsewhere are proposals considered wholly on their merits as logical propositions. Legislative conclusions, like the conclusions of most people in this work-a-day world, are complexes of many elements. How strongly do the supporters want it? How strong are the supporters who do want it? How strongly is the plan opposed? How strong are those who oppose it? How worthwhile is the idea itself from the standpoint of reason and practicality? These are questions the answers to which generally have most to do with legislative conclusions. Organization furnishes the answer to the first four of these questions, and, by its witness to the appeal of the idea to the minds of men, it unquestionably has its influence on the

conclusions of harassed legislators as to the worth-whileness of the idea itself.

It follows that when men like Elihu Root and President Long of the American Bar Association are found stressing the importance of organization to lawyers, as both have recently done, they are not uttering mere idle commonplaces. They are proclaiming as men of experience in practical affairs a prime need of the profession today. On all sides are heard demands for the improvement of the administration of Justice and nowhere are to be found adequately equipped leaders in this necessary movement except in the Bar of the country. In fact, it is the obvious duty of the Bar to point the way and to exert itself to the utmost to see that the way is followed. But experience shows that without an organization which can secure legislative action freeing the courts of the incumbencies which impede Justice, little can be done. The individual lawyer is a voice crying in the night. Only the organized lawyers of the country can enable each individual lawyer to discharge his high responsibility.

"This is an age of organization," said President Long in the circular letter recently sent out to members of the Association. "Business and all trades and professions but ours are fully organized. We now have organized crime, which should be confronted by a fully organized Bar. It is not. The American Bar Association is the oldest and largest organization of lawyers, but only twenty percent of them belong to it. This demand for better service (in the processes of Justice) finds the courts shackled and restricted by laws that impede progress and must be repealed before good service can be given. There should be fewer laws and more rules of court relating to procedure. If a law does not work well, it is difficult to change it; if a rule of court is unworkable it may easily be modified. . . . When the public is looking again to the courts for relief, the American Bar should be ready to serve. Only when organized will it be ready."

In view of the necessity of organization to promote the ideals of the profession as to the administration of Justice, it is becoming more and more evident that the measure of the individual lawyer's desire to have these ideals realized is to be found in his willingness to cooperate by joining organizations of the Bar. A real ideal is not a passive, sterile thing, sufficient for itself. It is not a little image in some interior shrine before which

it is sufficient for the individual to burn private incense. It wants to be realized on the widest possible scale, and it does not hesitate to demand all the necessary sacrifices which the process may entail. With all the lessons of the necessity of cooperative action to achieve results which every field including that of his own profession furnishes, the lawyer who professes such ideals and yet is not willing to follow the only way in which some of the most important of them can be realized, is adopting an inconsistent attitude.

However, this is the attitude which many thousands of the lawyers of the country are adopting at present. We do not believe it is a conscious attitude. The rapid increase in membership of the American Bar Association within the last six years shows that there is no great difficulty in securing the proper response when the matter is presented in a well organized membership campaign. Still, as President Long pointed out, the Association, even with its present record membership of nearly 24,000, has only about twenty percent of the lawyers of the country in its ranks. It should have fifty or seventy-five percent at the least. The more it has, the more effective it will be in achieving the results which every good lawyer wants to see achieved and for which the forces of the ablest individual or the ablest collection of detached individuals are quite inadequate. Every member of the Association should do his utmost to bring some heretofore indifferent member of the profession into the ranks. Within it, he is a force. Outside of it, he remains an individual, with all an individual's limitations in an age of cooperation.

#### WESTWARD HO!

Every member of the Association who can make arrangements to do so should attend the annual meeting of the Association at Denver this year. He will there come in contact with men of his profession from all over the country, thus broadening his acquaintanceship, extending his horizon, and nationalizing his thinking. He will find in the proceedings of the Association and its subsidiary bodies a summing up of all that is being done professionally for the advancement of jurisprudence in this country, and he should take from all this an added interest in, and understanding of, the really important legal movements of the day.

Is he interested in the current complaints

that the criminal law is not properly enforced? Well, there is to be a symposium on this pertinent and timely subject on the afternoon of the first day of the meeting, and the section of criminal law will discuss aspects of it at its two regular sessions. Does the subject of "Greater Efficiency in Judicial Procedure" appeal to him? There is also to be a symposium on this topic, participated in by men fully equipped to say something worth-while about it. We might go on further in the same vein, were space not limited. No matter what aspect of professional life and effort the lawyer is interested in, he will find something at the annual meeting to attract and stimulate him.

Does visiting favored parts of his own country also appeal to him? Does he like to get acquainted with America as well as with Americans of his own profession? Then the opportunity which the annual meetings afford should not be overlooked. Viewing our annual meetings from this standpoint, the late Stephen S. Gregory, former Editor-in-Chief of the Journal and a member of the Association whom so many of his fellow members still hold in affectionate remembrance, wrote in 1920:

"We meet in all parts of it. In 1907 at beautiful Portland on Casco Bay, that wonderful New England shore; in 1908 at the Metropolis of the Pacific Northwest on Puget Sound, that tremendous natural harbor; in 1910 at Chattanooga on storied and historic grounds; at Salt Lake City in 1915; at the western metropolis in 1916; at old Boston, rich in historic association and all the resources of modern culture, in 1919; and this year (1920) in beautiful St. Louis, the acknowledged Queen of the Mississippi Valley, with its traditions of Gallic graces and culture, of genuine hospitality and cordiality, both southern and western, its great natural beauty and its able Bar, from whom our first President James O. Broadhead was chosen."

And this year we meet in Denver with natural beauties unsurpassed, with its western hospitality as genuine in ring as the metal from the Colorado mountains, with a civic energy which has given a great city for the mountains to keep their eternal watch over, with historic associations that are of the very warp and woof of our national history, with its able and progressive Bar, and with what strikes at least the passing traveler as a "freer air" that "blows over the heads of the people." No meeting place has ever furnished a more enjoyable prospect.

# ABRAHAM LINCOLN AS A LAWYER

Estimate of Great Emancipator from Professional Standpoint by One With Unusual Opportunities for Personal Observation—Paper Read in 1897 by Judge A. Bergen Before the Kansas State Bar Association But Not Heretofore Given General Circulation

IT would be of doubtful propriety that any person should attempt to address the Bar Association of the State of Kansas upon a subject with which all are so familiar as the public life of Abraham Lincoln, the most celebrated man of this age, and the great central figure in American history. He was President but little more than four years. The same great man practiced law for more than twenty-five years.

In this best of all educational work for mental training, he attained that remarkable tact, prudence, wisdom and intellectual power, accuracy of thought and skill in diction, which guided this nation in the most perilous times since its first existence. He was transferred to the chief magistracy of the nation directly from the bar.

When I was beginning the study of law and in the first year after my admission to practice, I had the highly prized opportunity of seeing him in the courts of five counties and of being in the hotel parlors with him, five all too short evenings, filled with wit, wisdom, humor and laughter, and of most carefully observing him and his every word and movement in several noted trials.

Your committee, having heard of this, have invited me to give you some of my personal recollections of Abraham Lincoln as a lawyer. Although in great doubt, in the vast mass of material which I know and have heard, as to what would be most entertaining, or whether anything I would say would not be tiresome, yet I have accepted the task, in the full confidence that almost anything concerning the professional character, bearing and conduct of a man so illustrious, might be of some interest to his brother lawyers.

Physically he was tall, thin, bony, flat chested, angular and crooked, with long arms and legs, and large feet and hands.

He was ungraceful, even awkward, in every movement, careless in dress, unless, as it would sometimes seem, he took the care to roughen his high silk hat, in which he carried his papers, by rubbing the nap the wrong way when the hat was new, if ever it was new.

No complete idea of the irregularity of the profile of his features can be had from his pictures. These seem to me to be more like an ordinary man than was the original. Studying his face directly from the side the lowest part of his forehead projected beyond his eyes to a greater distance than any other person's that I have ever seen. In the court room, while waiting for the Armstrong case to be called for trial, I watched and studied his face for two full hours. I then estimated that his forehead protruded beyond his eyes more than two inches and retreated rapidly, about 25 degrees from the perpendicular, until it reached a usual height in a straight line above his eyes. From the front his eyes looked very deep set and sunken, by reason of this abnormal extension of the frontal bone.

He sat among the lawyers for these two hours with his head thrown back, his steady gaze apparently fixed on one spot of the blank ceiling, without the least

change in the direction of his dull expressionless eyes, and without noticing anything transpiring around him and without any variation of feature, or movement of any muscle of his face. I suppose he was thinking of his coming case. Herndon says he was capable of longer continued, concentrated, vigorous thought upon one subject than any other man. His expression was of the deepest melancholy. It aroused my sympathies for the man on whose lineaments poignant, mental suffering was so distinctly marked.

But whenever he began to talk his eyes flashed and every facial movement helped express his idea and feeling. Then involuntarily vanished all thought or consciousness of his uncouth appearance, or awkward manner, or even his high keyed, unpleasant voice. It required a critical effort of the will to divert attention to the man himself or anything about him, away from the substance of what he was saying, whether it was earnest and dignified or humorous.

To the judges and practitioners with him at the time I knew him, when he had been at the bar twenty years, and for the period of about six years before he was elected President, his most noticeable characteristic was his extraordinary faculty for correct reasoning, logic and analysis. But not less than this to the student of language or rhetoric was his clear, full, orderly and accurate statement of a case—so fair and so perspicuous that it was often said that after Lincoln had made his statement there was but little occasion for argument on either side.

He habitually employed at the bar the same kind of care, skill and nicety in the use of words and in the expression of ideas which he so often afterwards exhibited; instances of which are seen in the changes for the better which he made in the writings of his scholarly Secretary of State, William H. Seward, particularly in the communication relative to the Trent affair, which probably saved a war with England, and in his Gettysburg address, the admiration of the world.

He seemed to be slow in his mental operations; many of his biographers say he was slow in thinking. But this was only seeming. He thought vigorously and thoroughly, but did not speak quickly. In reality it was only his great care to know his ground. His habit was, before speaking or acting, to deliberately look through, around and beyond every object, fact, statement or proposition to which his attention was called, and subject it to his wonderful powers of perception, reason, logic and analysis. This required time. But woe to the cause of his opponent which depended on falsehood in fact, defective logic or fallacious argument. It was sure to be torn to shreds and its true character shown by the clear, simple, strong language of one so endowed and trained that he could not only see through things, but could most clearly reveal his own mind and thoughts to others.

He thought much. He read comparatively little. He knew thoroughly the works of Coke, Blackstone, Stephen, Chitty, Starkey and, later, Greenleaf's *Evi-*

dence and Story's Equity. These contained the germs of nearly all law. He gave little time searching for cases, or studying what is termed case law. He commenced practice when there were few text-books or reports, only two or three of Illinois, and when elected President there were only twenty volumes of Illinois reports. In these he participated as counsel in about one hundred cases. There are now of the Supreme Court one hundred and sixty volumes, and of the Court of Appeals sixty-two; in all of Illinois reports alone two hundred and twenty-two, more than eleven times the number in existence when he quit the practice.\*

It has always seemed to me that such study of principles and of their application to facts tended to strengthen his mental powers more than would the hunting among the thousands and thousands of cases in digests for references, and then studying scores of cases to find authority, which now seems necessary to success in the practice.

On the circuit Lincoln cited little of authority; indeed, it seemed to me that he had not much respect for opinions of judges, except for the correct reasoning they presented.

The old maxim (Is it now obsolete?), "he knows not the law who knows not the reason for the law," did not apply to him. He stated the rule and gave the reason as clearly, fully and logically as it appears in the writings of the masters of jurisprudence, and without having seen a decision, generally reached the same conclusion as the Supreme Courts who sat near large libraries with the help of elaborate briefs and with ample time to examine other cases.

Avoiding deception in fact, argument or law, with his clear vision and accurate and powerful reasoning powers and fairness and thoroughness of statement, he had the respectful confidence of the judges to a remarkable degree. It was generally seen and felt on the circuit that Lincoln did not need to produce opinions as authority, but the presumption was that the court would agree with him upon any proposition he made unless his antagonist should produce a case directly in point against him. Then the remark was not unusual from the bench that if the question had been original in that court the decision might have been different.

He was always courteous and kind. His sympathy for some of the poor friends of his struggling youth at times led him to generous self-sacrifice which would have honored Ian MacLaren's hero, Doctor Weelum McClure.

By some habitual litigants, and by some political opponents, Mr. Lincoln was often referred to as a third rate lawyer. He could not make black look white. He would not intentionally misrepresent either law or facts, or use false logic. Some men think that a perfect lawyer can win any case, good or bad, and measure his ability by his success in securing victory for the wrong. Lincoln had none of this. I have never heard it suggested that he lost a just cause, wherein any lawyer ought to have succeeded. In fact, he rarely lost a case. Where he could, he examined very fully before trial or even before agreeing to go into a trial. If from such preliminary investigation he could see that the law or facts were against his client, a settlement was recommended. If this was impossible, Lincoln usually managed to get out of trying the case, sometimes by turning it over to his partner, Judge Stephen T. Logan, a man whom they all called a first-class law-

yer, or, afterwards, William H. Herndon, who could be equally as skillful, intense, eloquent, pathetic and vehement on the wrong side as on the right. If, however, by a client's misrepresentation of the evidence or otherwise Mr. Lincoln got into the trial of a cause wherein he became satisfied his client was in the wrong, he appeared very weak, spiritless and destitute of resources. But if satisfied of the justice and righteousness of his client's case, and with time for mature thought, he went into and through with the trial with a buoyant, dominant courage and power which was well nigh irresistible.

His tact was remarkable. He carefully studied and thought out the best way of saying everything, as well as the substance of what he should say.

Every important thing he did or said seemed to me to be carefully premeditated, although to the casual observer it may have seemed that many things were entirely impromptu.

The region for fifty miles around was filled with what were said to be his stories. His anecdotes had so high a reputation, that often when any would-be humorist started a new story, of the success of which he had some doubt, he attributed it to Mr. Lincoln.

Those who were in doubt as to their ability to get off an old joke well, frequently assumed to quote it as if he had so told it; and if one wanted to say something smutty he generally prefaced it with "as Abe Lincoln said." This gave it currency and took off the curse. Very few of the many jokes and stories I heard from him bordered on coarse vulgarity. But the fact is he fully appreciated the mirth aroused by placing together the sublime and the ridiculous, the refined and the gross, the spiritual, at least in pretense, and the sensual, and used them wherever they were most effective to communicate and fix an important truth, or to make that odious which deserved condemnation.

His manner in presenting a case was intensely earnest and sincere. An unprejudiced person could not help feeling that he believed all he said.

A singularity about him was that often and indeed in every case that I witnessed, he said or did some very peculiar things, or some common thing in a very remarkable manner. Usually this was done to match and overcome the eloquence of an opponent. While this seemed to the jury to have come to him on the spur of the moment, yet usually it came at the critical point of his case, directing special attention to that which he desired should be most prominent, and so impressed itself upon the mind of the dullest juror, that it would sink deep and never be forgotten. This also attracted people to hear him, and in those days was a great advertising medium.

Other lawyers were afraid of it. They felt sure it would strike somewhere, but they never could tell beforehand just where it would hit.

Sometimes he seemed to take a delight in expressly conceding to his opponent every proposition and fact which his client or the spectators thought to be in his favor and then to the surprise of his antagonist and client, take some unexpected but firm and impregnable position.

In a trial he was wise as a serpent, but to his adversary not harmless as a dove.

The first time I saw him as a lawyer was in the old Morgan County Court House at Jacksonville, Illinois, defending a very wealthy, aristocratic democrat, one of the chivalry, Col. Dunlap, in an action for ten thousand dollars damages brought against him by the

\*There are at present (1926) 326 volumes of the Illinois Supreme Court Reports and 251 volumes of the Illinois Court of Appeals Reports.

editor of the opposition, or as many then called it, the abolition paper, on account of a deliberate, carefully planned cowering, administered by the colonel to the editor on a bright Saturday afternoon in the public square of the town, in the presence of hundreds of the town and country people whom the colonel desired to witness that degrading performance. Besides local counsel the editor had employed Ben. Edwards, who was the most noted for eloquence of all the democratic lawyers in the state. Col. Dunlap retained Lincoln as one of his attorneys to defend. I ran off from my recitations for the sole purpose of hearing Lincoln. Edwards used all the arts of the orator and advocate. He pictured till it could be felt, the odium and disgrace to the editor, worse than death. He wept and made the jury and spectators weep. The feeling in the court house was roused to the highest pitch of indignation against the perpetrator of such an outrage. As against the plaintiff, outlaw had no right to live, much less to retain and enjoy his wealth. It was felt that all the colonel's fortune could not compensate for the lawless indignity, and that the editor probably would get his full \$10,000. No possible defense or palliation existed. Before all eyes were dried, it came Lincoln's turn to speak. He dragged his huge feet off the table on the top of which they had been calmly resting, set them on the floor; gradually lifted up and partly straightened out his great length of legs and body and took off his coat. While he was removing his coat, I, and all others noticed his eyes very intently fixed upon something on the table before him. He picked up the object, a paper, from the table. Scrutinizing it closely and without having uttered a word, he broke out into a loud, long, peculiar laugh, accompanied by his most wonderfully funny facial expression—there never was anything like the laugh or the expression. A comedian might well pay thousands of dollars to learn them—it was magnetic. The whole audience grinned. He laid the paper down slowly, took off his cravat; again picked up the paper, looked at it again, and repeated the laugh. It was contagious. By that time all in the packed court room were tittering or trying to hold in their cacklings. He then deliberately took off his vest, showing his one yarn suspender, took up the paper, again looked at it and again indulged in his own loud peculiar laugh. Its effect was absolutely irrepressible. The usually solemn and dignified Judge Woodson, the jury and the whole audience could hold themselves no longer, and broke out into a long, loud continued roar; all this before Lincoln had ever uttered a word. I call this acting.

The occasion for his merriment was not very funny, but it was to the point. He apologised to the court for his seemingly rude behavior and explained that the damages as claimed was at first written \$1,000. He supposed the plaintiff afterwards had taken a second look at the colonel's pile and had thereupon concluded that the wounds to his honor were worth \$10,000.

The result was to at once destroy the effect of Edwards' tears, pathos, towering indignation, and high wrought eloquence, and to render improbable a verdict for more than \$1,000.

Lincoln immediately and fully admitted that the plaintiff was entitled to a verdict for some amount, argued in mitigation of damages, told a funny story applicable, and specially urged the jury to agree upon some amount.

The verdict was for a few hundred dollars and was entirely satisfactory to Lincoln's client.

Though not asserted by himself, nor in any way made offensively prominent, yet to the close observer, or to an intimate acquaintance, the most pervading and over all dominant element of his character and conduct under all circumstances was his love of truth, not merely the moral avoidance of a lie, which may be common enough among Americans, who have early read, admired and tried to emulate George Washington in the episode with his little hatchet, and in imitation of which the bar, is popularly, though erroneously, supposed not to have made a shining success; but truth in its most comprehensive sense; correctness and accuracy in fact, in science, in law, in logic, in reasoning, and in every field. While he had no contempt for any man, yet his love of truth so permeated his whole nature that he detested and avoided any and every thing, untrue, incorrect, illogical or fallacious. All his biographers attribute this quality to him, and it is borne out by my observation and his general repute in the neighborhood.

William H. Herndon was Lincoln's last partner. He was associated with him in business longer than any other man. In his biography he is none too favorable to Lincoln, and professes to be impartial and therein, like scripture records, to give all the dark as well as the bright as to his life and character. He even states or intimates some things merely upon surmise and without such facts or proof as should satisfy a person who knows the rules of evidence. I am satisfied Herndon thought himself a better lawyer and speaker than Lincoln. In some views he was. Mr. Herndon says "Lincoln loved truth for its own sake. To him it was reason's food." "His pursuit of truth was indefatigable." "Honesty was his polar star." "He would never in the slightest degree sacrifice his convictions of truth." "In the grand review of his characteristics nothing creates such an impressive effect as his love of truth. It looms up above everything else." "The universal testimony was 'He is an honest man.'"

This brings me to the last incident I shall refer to, and which by arousing my indignation, has led me to write or say anything in this presence about a man concerning whom so many have written and spoken.

In the index to later American editions of an English law book, *Ram on Facts*, is found this, which I personally know is not a fact, viz: "Lincoln, President Abraham, how he procured an acquittal by a fraud, 269 n."

The text of the note referred to is as follows: "In *Lamon's Life of Abraham Lincoln*, p. 327, an account is given of Mr. Lincoln's defense of a man named Armstrong, under indictment for murder. The evidence against the prisoner was very strong. But, says the biographer, 'the witness whose testimony bore hardest upon Armstrong, swore that the crime was committed about eleven o'clock at night (my memory is he said about midnight), and that he saw the blow struck by the light of a moon nearly full. Here Mr. Lincoln saw his opportunity. He handed to an officer of the court an almanac, and told him to give it back to him when he should call for it in the presence of the jury. It was an almanac of the year previous to the murder. Mr. Lincoln made the closing argument for the defense and (in the words of Mr. Lamon) in due time he called for the almanac, and easily proved by it that at the time the main witness declared the moon was shining in great splendor there was in fact no moon at all but black darkness over the whole scene. In the roar of laughter and undisguised astonishment succeeding

this apparent demonstration, court, jury and counsel forgot to examine that seemingly conclusive almanac and let it pass without question concerning its genuineness." This is sensational writing, overdrawn in nearly every particular; but I shall notice only one point.

Though the case awakened intense local interest, as any other murder trial does, it became widely celebrated only through the fact that a man so distinguished as Lincoln then was, appeared in it as an advocate. All the larger biographies refer to it, Lamon, Arnold, Herndon, Hay and Nicolay, and, recently, Miss Tarbell in McClure's Magazine. Dr. Edward Eggleston in his novel, *The Graysons*, most effectively makes the use by Mr. Lincoln of an almanac the climax of his story.

One of the jurors who acquitted Armstrong makes a solemn published statement that Edward Eggleston's romance is inaccurate as to some of the facts of the killing and of the trial.

In the *Globe Democrat* of September 15, 1895, a correspondent, writing from the town of Virginia, Illinois, to which the county seat of Cass County had then been removed, says "The old Court House in Beardstown still stands. It was in this edifice that Lincoln used a doctored almanac in defense of Duff Armstrong for murder." This was republished in the *Virginia Gazette* and widely copied in the country press.

The homicide took place in Mason county, in the purlieus of a camp meeting where the rowdy element from country and town for forty miles around had established their headquarters for gambling, horse-racing, whisky-selling, cock fighting and other associate vices. The religious camp meeting folks and the rough element, who together then constituted a majority of the people of that region, determined that every person suspected of connection with the crime should be punished, the former so that order and their good name might be preserved, and the latter that the death of a leader among them should be avenged. One man had been convicted and sent to the penitentiary for the offense. Armstrong, jointly indicted with him, obtained a change of venue to Cass county.

The trial occurred at the first term of the court, which I attended after my admission to the bar. All of the few cases which I had for that term had been entirely finished. I had an intense desire to learn how good lawyers examined witnesses, and the manner of doing work in court in detail not found in the books, and especially to see and hear all of a trial conducted by counsel so eminent. Particularly was my closest attention directed to Mr. Lincoln and every word and movement of his, from the time he went into court until the time when he finally left it.

During the entire trial I was seated in the bar behind the attorneys for the state and the attorneys for the defendant, not more than four feet from each of them, and noticed everything with the deepest interest and most watchful scrutiny.

During the introduction of the evidence Mr. Lincoln remarked to the judge that he supposed the court would take judicial notice of the almanac; but in order that there might be no question as to that, he introduced it in evidence, the court remarking that any one might use the almanac during the argument.

Lincoln, with his usual care, had brought with him from Springfield the almanac then regarded as the standard in that region. At a recess of the court he took it from his capacious hat and gave it to the sheriff, Dick, with the request that he would hand it to him

when he called for it. Afterwards, in the campaign, they got Sheriff Dick to make a solemn, weighty affidavit of this fact and that he did not notice the date. This is taken by some as conclusive that Lincoln intended to deceive. His only object was to break the monotony of his argument, and to fix the attention and memory of the jury on the fact proved.

When Lincoln called for the almanac he exhibited it to the opposing lawyers, read from it and then caused it to be handed to the jury for their inspection. I heard two of the attorneys for the state, in whispered conference between themselves, raise the question as to the correctness of the almanac, and send to the office of the clerk of the court for another. The messenger returned with the word that there was no almanac of 1857 in the clerk's office. (It will be remembered that the trial occurred in 1858, for a transaction in 1857. It was afterwards, in the presidential campaign, even charged that Lincoln must have gone around and purchased all the almanacs in the county offices.) Some one then said there was an almanac of 1857 in the office of Probate Judge Arenz, which was in the court house. Some person immediately brought it to the prosecuting attorneys, who examined it, compared it with the almanac introduced by Mr. Lincoln, and found they substantially agreed, although at first the state's attorney spoke as if they had found some slight difference.

All this I personally saw and heard and it is as distinct in my memory as if it had occurred but yesterday.

No intimation was ever made, so far as I knew, that there was any fraud in the use of the almanac until two years afterwards, when Abraham Lincoln was the nominee of the Republican party for the presidency. Then, in the mountains of southern Oregon in 1860, I saw in a Democratic newspaper, published at St. Louis, an article personally abusive of Mr. Lincoln, saying he was no statesman, only a third rate lawyer, and to prove the deceptive and dishonest nature of the candidate, printed an indefinite affidavit of one of the jurors who had acquitted Armstrong that Mr. Lincoln made fraudulent use of the almanac on the trial. He seems not to have called this—his pretended knowledge—to the attention of the other jurors, but very promptly joined in the verdict of acquittal and would seem not to have known or remembered that there was anything wrong till during a heated political canvas.

When I saw the statement I regarded it and treated it as a partisan campaign lie. Soon afterwards I saw an affidavit by Milton Logan, the foreman of the jury, that he personally examined the almanac, when handed to the jury, and particularly noticed that it was for 1857, the year of the homicide. I had a better opportunity than any of the jurors to see, hear and know all that was publicly and privately done by said attorneys on both sides, and know that the almanacs of 1857, now preserved in historical and other public libraries, sustain and prove to the minute all that was claimed by Mr. Lincoln on that trial as to the time of the rising and setting of the moon.

I spoke of the facts when I first saw the charge, and often since, but have never written anything concerning it until this time.

I do not know that this calumny was ever called to Mr. Lincoln's attention, or if it was that he ever took the pains to contradict it or deign to notice it. He might well have pursued his regular habit of disregarding such things.

If his life-long reputation, character and conduct

were not sufficient to refute it his word would have been of little more avail.

Ram on Facts and other books which publish what they pretend are the facts as to this incident, do not give the newspaper accounts as their authority. But all so far as I have noticed are based on a communication by J. Henry Shaw, a lawyer of Beardstown, a political opponent, who was one of the prosecuting attorneys in the Armstrong case. His letter, written after Mr. Lincoln's death, was published in Lamon and in Arnold, and all others who have referred to this feature of this case cite this as their authority.

In that communication Mr. Shaw, though opposed to Mr. Lincoln politically and professionally, says there were two almanacs at the trial, and that he believes "Mr. Lincoln was entirely innocent of any deception in the matter." But he does say "that the prevailing belief in Cass County was that the almanac was prepared for the occasion; and that Mr. Carter, a lawyer of Beardstown who was present at but not engaged in the Armstrong case, says 'he is satisfied that the almanac was of the year previous and thinks he examined it at the time.'"

Now this man Carter, Buchanan's village postmaster, had one case for a jury trial at that term. Mr. Lincoln, for a \$5 fee, had run Carter's worthless litigious client out of court, on a motion for a security for costs. Of course it was easy to satisfy this man Carter that Mr. Lincoln would do, or had done almost anything diabolical, as it also was the maddened, unthinking camp meeting people and the wicked, rough element, who alike had already condemned the accused, and who craved the rare spectacle of a hanging. These all would have preferred to believe the inculcating testimony of a disreputable rowdy, gambler and joint-ist, even if to do so they had to ignore all the almanacs in christendom.

Other features of the Armstrong case were more interesting and more difficult than this episode of the almanac. They called out the mental powers even of Mr. Lincoln. In it he showed that he had mastered some difficult questions in anatomy. The main witness testified that he saw Armstrong strike the deceased in the forehead with a slung shot. Physicians testified that the blow on the forehead was by a fist. They further testified that although the internal injury was in the forward part of the brain death was caused by a blow on the back of the head, which other evidence showed had been given by the man then in the penitentiary; and the evidence failed to show that Armstrong was acting in concert with him. Lincoln's principal medical witness was Dr. Stephenson of Petersburg, Illinois, who afterwards attained celebrity and honor as the first organizer, the father of the Grand Army of the Republic.

The use of the almanac was only a minor feature of the trial, but is the only feature ever mentioned. And why? It must be only because lawyers are the most trustworthy, or at least most trusted class of men, and to pander to the morbid appetite of those who want to believe that they all lie, and especially to fix a blot on the fair fame of that eminent lawyer, whom the people themselves, while he was only a lawyer, justly called "Honest Abe." It comes from the same feeling that banished Aristides because all called him "The Just." It is of a piece with the atrocious libels made by that prince of slanderers, Dickens, upon those whom he calls attorneys, to please a class of persons whom Judge Brewer, last summer said "would as soon expect to find a baby that never cried, a woman that

never talked, a Shylock loaning money without interest, a Mormon advocating celibacy, a gentleman without a cent opposed to the income tax, as an honest lawyer."

Now take such a man, with such a character and such a reputation, built up through twenty-five years of rigid circumspection, who had never deceived a court or any person, whose standing in the courts and in the community had for its basis, as he knew, his integrity and freedom from deception, and whose very means of living as well as his aspirations to help lead the people to a higher plane of thinking and of truth and humanity, and for a greater name for himself, depended upon maintaining that reputation; take that man in the spring of 1858, when he was aspiring to the United States Senate, and about a month before he was nominated as their candidate for that exalted position by the Republican State Convention of Illinois, against the most celebrated debater of the day, the little giant, Stephen A. Douglass, and in the same year when in their joint discussions he displayed to the nation his masterly qualities of mind and heart, leading to his election as president two years later: Take, I say, such a man, at such a time, who would have preferred the loss of his right arm to being guilty of a crime as black as subornation of perjury, openly perpetrated and almost certain to be detected by his sharp opponents: Take that man of brain and heart, benevolently surrendering his then precious time, his comfort and his services, for the wayward son of a poor widowed friend of his boyhood, without any hope of reward except the approval of his own conscience, and then see it printed in a law book "How President Lincoln procured an acquittal by fraud."

It is contrary to nature, impossible, absurd. As well say that the sun ceased to radiate heat or light. It would have stamped as the rashest fool one whom even his detractors always pronounced most prudent and most cautious. Such an act would have made Mr. Lincoln so ashamed of himself that never again would he have taken any pleasure in recognizing himself as a man, much less as a lawyer.

Henry Watterson, in his lecture, says with the greatest emphasis, and repeats, "President Lincoln was inspired by God." If so, he must have been receiving inspiration while at the bar. For there he gradually became educated in the use of all the marvelous tact, prudence, wisdom, goodness, courage and intellectual power which he afterwards displayed.

Many believed and some still believe he was small and weak when he was elected, and that he suddenly grew. These had never met and measured his gigantic intellectual height and strength. His friends among the Illinois lawyers never doubted his capability. Certainly he continued to grow and develop after he became president.

Those fearful souls whose hearts shrank within them because he had not been more in politics and office did not realize the mental training, power and capacity which can be attained in the study and practice of law.

### Contributions

The articles and letters contributed to the Journal are signed with the names or initials of the writers, and the Board of Editors assumes no responsibility for the opinions therein, beyond expressing the view, by the fact of publication, that the subjects treated are worth the attention of the profession.

# REVIEW OF RECENT SUPREME COURT DECISIONS

Pennsylvania Act Prohibiting Shoddy in Mattresses Held Unreasonable and Void—Effect of Termination of Federal Control on Suspended State Statutes Regulating Intra-State Tariffs—"Presumed Negligence" and Cummins Amendment—Public Utility Rate Cases—Meaning of "Claim" under Section 35, Penal Code—Trial of Defendant at Same Time on Two Indictments, Thus Depriving Him of Full Number of Jury Challenges, No Ground for Habeas Corpus—Res Judicata—War Risk Insurance

By EDGAR BRONSON TOLMAN

## Police Power—Protection of Health, Discrimination

The Pennsylvania Act absolutely forbidding the use of shoddy in comfortables, mattresses, etc., while permitting feathers and other materials to be used for such purposes after disinfection, is unreasonable and void and offends against the Fourteenth Amendment.

*Weaver v. The Palmer Brothers Company*, Adv. Ops. 366, Sup. Ct. Rep. v. 46, p. 320.

This decision, handed down shortly after that in *Schlesinger et al. v. State of Wisconsin et al.* (reviewed in the April number of the Journal), reveals once more the two viewpoints existing in the Supreme Court in respect to the extent to which the Fourteenth Amendment may be invoked to invalidate state legislation. In the *Schlesinger* case the majority of the court held invalid a Wisconsin statute construing all transfers made within six years of the grantor's death as made in contemplation of death and accordingly subject to inheritance taxes. Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone dissented, concluding that the Wisconsin legislature might not unreasonably have assumed it necessary to make this discrimination between this class of gifts and other transfers *inter vivos* in order to prevent the evasion of death duties. The present decision carries with it similar dissent, by the same learned Justices. The minority opinion, in upholding the validity of a statute prohibiting the use of shoddy in mattresses, is again more willing to take it for granted that the legislature may have acted upon tenable assumptions, whereas the majority of the court is not reluctant to examine the basis of such assumptions and to declare them well founded or ill founded as critical examination might disclose.

In 1923 the State of Pennsylvania passed a law providing that

No person shall employ or use in the making, remaking, or renovating of any mattress . . . or article of upholstered furniture: (a) Any material known as "shoddy," or any fabric or material from which "shoddy" is constructed; (b) any secondhand material, unless . . . sterilized and disinfected . . . ; (c) any new or secondhand feathers, unless . . . sterilized and disinfected. . .

A Connecticut corporation, that had for fifty years been engaged in the manufacture of mattresses, brought suit in the District Court for the Western District of Pennsylvania to enjoin the enforcement of the act upon the ground that, as applied to the corporation, it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment. The District Court held that in so far as it absolutely prohibited the use of shoddy the statute infringed the corporation's constitutional right, and granted an injunction. Upon

direct appeal to the Supreme Court the decree was affirmed.

Mr. Justice Butler delivered the opinion of the Court. After stating the facts, he said:

The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause or the equal protection clause. The answer depends on the facts of the case. Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. (Citing case.) . . . Invalidity may be shown by things which will be judicially noticed (citing case) . . . or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts.

The learned Justice described the nature and extent of the use of shoddy in the manufacture of articles made by appellee. He then adverted to the facts that the record failed to show that disease was in fact carried by shoddy, and that, at any rate, it was conceded that shoddy could be rendered perfectly harmless by an easy sterilization:

This evidence tends strongly to show that in the absence of sterilization or disinfection there would be little, if any, danger to the health of the users of comfortables filled with shoddy, new or second-hand; and confirms the conclusion that all danger from the use of shoddy may be eliminated by sterilization.

He continued:

And it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden. They are to be distinguished from things that the State is deemed to have power to suppress as inherently dangerous.

The State relied upon the case of *Powell v. Pennsylvania*, 127 U. S. 678, wherein had been held valid a statute forbidding the manufacture and sale of oleomargarine. In that case, the learned Justice pointed out:

It was assumed that most kinds of oleomargarine in the market were or might become injurious to health. Here, it is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health. And the fact that the Act permits the use of numerous materials, prescribing sterilization if they are secondhand, also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary.

Finally, he held that the prohibition could not be sustained as a measure to prevent deception, because regulations with respect to inspection and labels, already applied to bedding, could equally well be applied to shoddy-filled articles. The opinion concludes in the following words:

The constitutional guaranties may not be made to yield to mere convenience. (Citing case.) The business here

involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment.

Mr. Justice Holmes expressed the minority view:

If the Legislature of Pennsylvania was of opinion that disease is likely to be spread by the use of unsterilized shoddy in comfortables I do not suppose that this Court would pronounce the opinion so manifestly absurd that it could not be acted upon. If we should not, then I think that we ought to assume the opinion to be right for the purpose of testing the law. The Legislature may have been of opinion further that the actual practice of filling comfortables with unsterilized shoddy gathered from filthy floors was widespread, and this again we must assume to be true. It is admitted to be impossible to distinguish the innocent from the infected product in any practicable way, when it is made up into the comfortables. On these premises, if the Legislature regarded the danger as very great and inspection and tagging as inadequate remedies, it seems to me that in order to prevent the spread of disease it constitutionally could forbid any use of shoddy for bedding and upholstery. Notwithstanding the broad statement in *Schlesinger v. Wisconsin* the other day, I do not suppose that it was intended to overrule *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, and the other cases to which I referred there.

It is said that there was unjustifiable discrimination. A classification is not to be pronounced arbitrary because it goes on practical grounds and attacks only those objects that exhibit or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm. "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." *Miller v. Wilson*, 236 U. S. 373, 384. In this case, as in *Schlesinger v. Wisconsin*, I think that we are pressing the Fourteenth Amendment too far.

Argued by Mr. E. Lowry Humes for appellant and by Mr. Edwin W. Smith for appellee.

#### Carriers—Tariffs, Effect of Termination of Federal Control

Under Section 208 (a), Transportation Act, state statutes regulating intrastate tariffs, which have been suspended by regulations enacted during Federal control, become again operative upon the cessation of such control without the necessity of reenactment, unless changed by competent authority.

*Missouri Pacific Railroad Co. v. Boone*, Adv. Ops. 382, Sup. Ct. Rep., v. 46, p. 341.

In 1922 a passenger on an intrastate journey in Missouri checked her trunk over the line of the petitioner railroad. The trunk was obtained by a thief and never delivered to her. She brought suit for damages, and the state court allowed her to recover \$1,000, the full value of the trunk, to which she was entitled under a Missouri statute that had been enacted in 1855 and which the legislature had never repealed. The railroad contended, both in the state court and before the Supreme Court of the United States where the case was brought by certiorari, that the passenger was bound by a baggage tariff which limited recovery in such cases to \$100 unless a larger value had been declared and paid for. This tariff, applicable to both interstate and intrastate traffic, had been filed by the Director General of Railroads during Federal control. The railroad argued that this tariff was continued in force, until changed by state action or that of the Interstate Commerce Commission, after the cessation of Federal control, by virtue of Section 203 (a) of the Transportation Act of 1920. The first clause of this section provides that

All rates . . . and . . . regulations in anywise

. . . affecting . . . rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law.

The second clause of the same section prohibits, for six months after the termination of Federal control, the reduction of any rates.

Judgment for the full value was affirmed by the Supreme Court.

Mr. Justice Brandeis delivered the opinion of the Court. He stated the precise question before the Court in the following words:

The precise question is whether the state provision, which had been suspended by the filing of the tariffs of the Director General, became operative on September 1, 1920, without re-enactment, or whether affirmative action by the State after February 29, 1920, was necessary to restore the full liability theretofore created by its statute and which it had not repealed.

The argument which was persuasive upon the Court pointed out that to construe the Section as preventing the Missouri statute, although applicable only to intrastate commerce, from becoming operative unless actually re-enacted, would in effect repeal all such state laws affecting intrastate commerce. This, it was urged, was beyond the constitutional power of the Federal government to bring about. Such a repeal would not be authorized by the commerce clause, nor could it be said to be an appropriate means to ensure workable tariffs upon the restoration of the roads to their owners. The learned Justice agreed that such a construction would raise grave constitutional questions. From an examination of the Section in question he arrived at a construction which avoided this result. He said:

The first clause of Section 208 (a) is legislation permanent in character. It relates alike to changes which increase rates and to those which reduce. It contains no prohibition. It explains. Its purpose was not to conserve revenues but to remove doubts and avoid confusion. A clarifying provision was needed. Comprehensive changes in the rates, fares, charges, classifications, regulations and practices had been made by the Director General by filing the same with the Interstate Commerce Commission, pursuant to power conferred by Section 10 of the Federal Control Act. It was important that carriers and the public should know whether, and to what extent, these changed rates, fares, charges, classifications, regulations and practices would continue in force after the return of the railroads to their owners. This information the first clause supplied by specifying what tariffs were applicable. To facilitate the conduct of business by this means was an appropriate exercise of the power of Congress. To have undertaken to do so by means of abrogating all rates, fares and charges established by the several States in respect to intrastate commerce, and all classifications and regulations affecting them, would not have been. It is not lightly to be assumed that Congress would have resorted to means so extraordinary for securing workable tariffs.

The learned Justice then considered and rejected the contention that the primary purpose of the first clause of Section 208 (a) was to protect the carrier's revenue by making change of rates difficult. The effect of the clause, so construed would be to continue reductions as well as increases; and moreover the Transportation Act provided a machinery for all necessary increases in rates and so evinced no intent to maintain in force after the expiration of the six months' guaranty period tariffs established by the Director General. The learned Justice concluded:

When the first clause of Section 208 (a) is examined in the light of these facts, the construction to be given it becomes clear. In order to remove doubts as to what tariffs were to be applicable after the termination of federal control, Congress declared that the existing tariffs, largely

initiated by the Director General, should be deemed operative, except so far as changed thereafter—that is, after February 29, 1920—pursuant to law. Such modification of intrastate tariffs might result from action of the carriers taken on their own initiative. It might result from orders of the Interstate Commerce Commission. It might result from the making either of new state laws or of new orders of a state commission acting under old laws still in force and again becoming operative. Or such modification might result from the mere cessation of the suspension, which had been effected through federal control, of statutes or orders theretofore in force and still unaffected by any action of the authority which made them. In any of these cases, the change would be effected "thereafter"—that is, after the termination of federal control. The statute of Missouri enforced by its courts was in effect in 1922. The judgment is affirmed.

The case was argued by Mr. Merritt U. Hayden for the railroad and by Mr. Frederick L. English for the passenger.

#### Carriers—The Cummins Amendment

Failure to give written notice of claim within ninety days and to file claim within four months bars action by the shipper for damages to goods in transit, unless there be proof of negligence in fact.

Evidence of delivery to the carrier in good condition and of delivery by the carrier in bad condition is prima facie proof of negligence, but "presumed negligence" is not the kind of negligence referred to in the Cummins Amendment of 1915, as relieving the shipper from the obligation to give written notice of his claim within ninety days.

*The Chesapeake & Ohio Railway Co. v. The A. F. Thompson Manufacturing Co.*, Adv. Ops. 364, Sup. Ct. Rep. v. 46, p. 318.

A manufacturer sent two carloads of sheet iron on an interstate journey in cars furnished by the petitioner railroad. The stoves arrived at their destination in bad condition and the shipper brought suit to recover damages. The bills of lading required notice of such claims to be made in writing within four months of delivery. The shipper had given no notice. But it relied upon that provision of the Cummins Amendment (of 1915) which relieves the shipper from the necessity of filing its claim in writing where the loss complained of "was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence." The shipper offered proof of delivery of the goods to the shipper in good condition and of their delivery in bad condition. He contended that from these facts the carrier's negligence was to be conclusively presumed, and that the railroad was therefore liable unless it could show that the injury was caused by the act of God or the public enemy. The local state court gave judgment for the shipper, which was affirmed by the Supreme Court of Appeals of West Virginia. Upon writ of certiorari, the U. S. Supreme Court reversed the judgment.

Mr. Justice Stone delivered the opinion of the Court. He said:

We do not consider that the phrase "carelessness or negligence" of the carrier, as used in the Cummins Amendment in exempting shippers from giving written notice of a claim for damage, has any reference to the conclusive "presumption" to which we have referred. If such were the meaning of the statute, every case of carrier's liability for damage in transit would be a case of presumed negligence, and proof of written notice of claim for damage required by the bill of lading would always be dispensed with, and the plain purpose of the amendment would be defeated. We think that by the use of the words "carelessness or negligence," it was intended to relieve the shipper from the necessity of making written proof of claim when,

and only when the damage was due to the carrier's actual negligent conduct, and that by carelessness or negligence is meant not a rule of liability without fault, but negligence in fact.

Therefore, he continued, in order to make his case the shipper was required to show actual negligence by the carrier:

The effect of the respondent's evidence was, we think, to make a *prima facie* case for the jury. (Citing cases.) But even if this "*prima facie* case" be regarded as sufficient, in the absence of rebutting evidence, to entitle the plaintiff to a verdict (citing case), the trial court erred here in deciding the issue of negligence in favor of the plaintiff as a matter of law. For the petitioner introduced evidence of the condition of the cars from the time of shipment to the time of arrival, which persuasively tended to exclude the possibility of negligence.

Argued by Mr. C. N. Davis for petitioner and by Mr. Henry Simms for respondent.

#### Public Utilities—Rates

Although a public utility in the past may have charged excessive amounts to depreciation expense, thus accumulating reserve account balances greater than necessary to maintain adequately the property, it cannot be required to draw on these balances in order to overcome deficits in future earnings and to sustain rates which could not otherwise be sustained.

*Board of Public Utility Commissioners et al. v. New York Telephone Company*, Adv. Ops. 436, Sup. Ct. Rep. v. 46, p. 363.

This decision followed upon suit brought by a telephone company, operating in New Jersey, to restrain the enforcement of an order entered by the Board of Utility Commissioners of that state with respect to rates. The District Court for the District of New Jersey, three judges sitting, granted a temporary injunction, and upon appeal to the Supreme Court the decree was affirmed.

The order in question was made by the Board following an application by the company for an increase in rates. The Board disallowed the increase and required the company to continue service at the old rates. It was admitted that future income from service rendered would be insufficient to yield a fair return upon the value of the property invested. But the order of the Board required the company to make up these anticipated deficits in future net earnings out of depreciation reserves accumulated in the past. In accordance with the uniform system of accounting prescribed by the Interstate Commerce Commission, the company, in order to provide for depreciation of its property, each month made a charge against depreciation in the operating expense account, and credited the depreciation reserve account correspondingly. At the conclusion of the fiscal year prior to the action of the Board, this reserve account showed a balance of \$16,902,530. The Board concluded that the company had charged excessive amounts to depreciation expense. It therefore ordered the company to deduct future charges from the normal charge until at least \$4,750,000 of the excess should have been absorbed.

Mr. Justice Butler delivered the opinion of the Court. He held that even if the balance in the depreciation expense account was greater than required adequately to maintain the property, the company could not be compelled to make up future deficits therefrom. He said:

The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for

the public service. And rates not sufficient to yield that return are confiscatory. (Citing cases.) Constitutional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service. (Citing cases.) The customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. (Citing case.) The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses including the expense of depreciation is the company's compensation for the use of its property. If there is no return or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. (Citing cases.) And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future. (Citing cases.)

Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. It is conceded that the exchange rates complained of are not sufficient to yield a just return after paying taxes and operating expenses, including a proper allowance for current depreciation. The property or money of the company represented by the credit balance in the reserve for depreciation cannot be used to make up the deficiency.

Argued by Mr. Thomas Brown for appellants and by Messrs. Charles M. Bracelen and Thomas G. Haight for appellees.

#### Public Utilities—Rates

Where a public utility commission has for more than two years failed to act upon the application of a utility for relief from confiscatory rates, the utility may apply to a federal court for the aid of equity. The commission cannot contend that in putting into effect an earlier schedule it has disposed of a second schedule filed before it, where the commission has in fact held hearings on this second schedule and otherwise treated it as pending.

*Smith et al. v. Illinois Bell Telephone Co.*, Adv. Ops. 440, Supt. Ct. Rep. v. 46, p. 408.

This case arose upon suit brought by an Illinois telephone company to restrain the state Commerce Commission from enforcing rates alleged to be confiscatory. The averments of the bill, which were not challenged, declared that the company had been operated with reasonable economy but that for four years a deficit had resulted. A schedule of rates had been filed by the predecessor in ownership of the present company before the Commission in July, 1919. While it was pending the present company filed a second schedule of increased rates. The Commission then put the first schedule into effect. Nevertheless, it issued several successive orders suspending the date when the second schedule was to become operative, and in 1921 entered an order permanently suspending or cancelling the second schedule. A state court, upon application by the company, reversed this order and remanded the proceeding. For two years the Commission then took no action although the company requested a hearing on the schedule. Thereupon the company brought this suit in the District Court for the Southern District of Illinois. A permanent injunction was granted. Upon appeal to the Supreme Court the decree was affirmed.

Mr. Justice Sutherland delivered the opinion of the Court. The contention of the Commission and the Court's reply thereto appear from the following:

The argument seems to be that the second proposed schedule of rates, filed while the first was pending, purported to cancel the first schedule; that the order putting into force the rates in the first schedule was in effect a finding against the second and put an end to it; that no legal application for an increase of rates has since been made; therefore, when the suit was brought, nothing was before the commission upon which that body could lawfully act. The short answer is that the commission, after disposing of the first schedule, had uniformly treated the second as pending; had held hearings and made interlocutory orders in respect to it; had entered an order for its permanent suspension; after reversal by the state court on appeal, by which tribunal it was regarded as properly pending, had restored it to the docket for further proceedings; and had held further hearings. To say now that all this shall go for naught and that the company must institute another and distinct proceeding, would be to put aside substance for needless ceremony.

It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceedings, the commission for a period of two years, remained practically dormant; and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmation of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief.

Argued by Messrs. Harry C. Heyl and R. H. Radley for appellants and William D. Bangs for appellee.

#### Criminal Law

Obtaining the possession of non-dutiable merchandise from a collector of customs is not obtaining the approval of a claim "upon or against the Government," nor is it "defrauding" the Government, within Section 35, Penal Code; the "claim" must be one for money or property, asserted in respect to the Government's liability to claimant.

*United States v. Cohn*, Adv. Ops. 249, Sup. Ct. Rep. v. 46, p. 251.

The indictment against Cohn was dismissed upon demurrer on the ground that the matters charged did not constitute a crime against the United States. The Government then took a writ of error to the District Court for the Northern District of Illinois by virtue of that provision of the Criminal Appeals Act which permits such procedure where the Judgment is based upon the construction of the statute on which the indictment was founded. The statute here in question was Section 35 of the Penal Code. This Section makes it a crime against the Government to use any fraud or concealment or trick in order to obtain the approval of "a claim against the United States," or "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States." The indictment against Cohn alleged that when a shipment of cigars had been received in a United States customhouse in Chicago, consigned to him, he had obtained possession of the cigars by falsely concealing the fact that the bill of lading had already arrived attached to a draft and marked not to be

delivered to Cohn until the draft was paid. The customhouse brokers, as Cohn's innocent agents, thus swore that the draft had not arrived, and by giving bond obtained the cigars. The Supreme Court, assuming that under these regulations Cohn was not entitled to obtain the cigars without paying the draft, nevertheless concluded that these facts did not allege a crime within Section 35, and affirmed the judgment.

Mr. Justice Sanford delivered the opinion of the Court. After stating the facts he said:

Obtaining the possession of non-dutiable merchandise from a collector is not obtaining the approval of a "claim upon or against" the Government, within the meaning of the statute. While the word "claim" may sometimes be used in the broad juridical sense of "a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty," (citing case), it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. And obviously it does not include an application for the entry and delivery of non-dutiable merchandise, as to which no claim is asserted against the Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession. This is not the assertion of a "claim upon or against" the Government, within the meaning of the statute; and the delivery of the possession is not the "approval" of such a claim.

He likewise rejected the contention that these acts amounted to "defrauding" the Government. In Section 37, relating to conspiracies to defraud the United States, "defraud" had been broadly construed to mean "interfering with Governmental functions by deceitful means." But the use of the word in Section 35 was different:

Section 37, by its specific terms, extends broadly to every conspiracy "to defraud the United States in any manner and for any purpose," with no words of limitation whatsoever, and no limitation that can be implied from the context. Section 35, on the other hand, has no words extending the meaning of the word "defrauding" beyond its usual and primary sense. On the contrary, it is used in connection with the words "cheating or swindling," indicating that it is to be construed in the manner in which those words are ordinarily used, as relating to the fraudulent causing of pecuniary or property loss. And this meaning is emphasized by other provisions of the section in which the word "defraud" is used in reference to the obtaining of money or other property from the Government by false claims, vouchers and the like; and by the context of the entire section, which deals with the wrongful obtaining of money and other property of the Government, with no reference to the impairment or obstruction of its governmental functions.

Argued by Solicitor General Mitchell and Assistant to the Attorney General William J. Donovan for plaintiff in error and by Mr. Bernhardt Frank and Benjamin E. Epstein for defendant in error.

#### Criminal Law—Habeas Corpus

The objection that defendant was tried upon two indictments at the same time and was therefore deprived of the full number of jury challenges that he would have had if tried separately is not one that can be raised on writ of habeas corpus.

*Ashe v. United States ex rel. Valotta*, Adv. Ops. 378, Sup. Ct. Rep. v. 46, p. 333.

Valotta killed a man in a street brawl and then killed a policeman who was trying to apprehend him. He was separately indicted, tried, found guilty of the murder of each man, and sentenced to death. After

the time for writ of error or certiorari had elapsed, his counsel obtained a writ of *habeas corpus*. The judge of the District Court of the Western District of Pennsylvania discharged Valotta from custody upon the ground that Valotta had been tried upon two indictments for felony at the same time and was deprived of the full number of challenges that he would have had if he had been tried separately upon each. The warden appealed, and the Supreme Court reversed the order.

Mr. Justice Holmes delivered the opinion of the Court. He dismissed the contention that the court lost jurisdiction by trying the indictments together:

Manifestly this would not be true even if the trial was not warranted by law. But the Supreme Court of Pennsylvania has said that there was no mistake of law, and so far as the law of Pennsylvania was concerned it was most improper to attempt to go behind the decision of the Supreme Court, to construe statutes as opposed to it and to hear evidence that the practice of the State had been the other way. The question of constitutional power is the only one that could be raised, if even that were open upon this collateral attack, and as to that we cannot doubt that Pennsylvania could authorize the whole story to be brought out before the jury at once, even though two indictments were involved, without denying due process of law. If any question was made at the trial as to the loss of the right to challenge twenty jurors on each indictment, the only side of it that would be open here, would be again the question of constitutional power. That Pennsylvania could limit the challenges on each indictment to ten does not admit doubt.

There was not the shadow of a ground for interference with this sentence by *habeas corpus*.

Argued by Mr. James O. Campbell for appellant and Mr. George E. Wallace for appellee.

#### Res Judicata

A judgment entered by a state court, holding that a railway employee was engaged in intrastate commerce at the time of the accident, and adjudicating the claim for damages under the state compensation law, is *res judicata* in an action brought by the injured party in a federal court under the theory that the employee was engaged in interstate commerce at the time and that therefore the Federal Employers' Liability Law should apply.

In such a case the requirement of identity of parties is satisfied where the sole beneficiary was an actual party to the proceeding under the state law, and present, by the personal representative of deceased in the federal court, and where no other rights are involved.

*Chicago, Rock Island & Pacific Railway Co. v. Schendel*, Adv. Ops. 447, Sup. Ct. Rep. v. 46, p. 420.

An employee of the railroad was killed under circumstances making it uncertain whether or not he was engaged at the time in interstate commerce. The administrator of the estate brought suit in a district court of Minnesota under the Federal Employers' Liability Law. While that action was pending the railroad brought a proceeding before the proper tribunal in Iowa, under the workmen's compensation law of that state, by which, it was admitted, the employee and the railroad had elected to be bound. The widow was there the adverse party, and in spite of her objections an arbitration was effected settling the claim under the state law. Appeals to state courts followed, but each of them upheld the finding of the board that deceased had been engaged in intrastate commerce, and affirmed the award. Thereafter, when the case brought by the administrator came on for trial in Minnesota, the railroad pleaded the Iowa judgment as *res judicata*, and invoked the full faith and credit clause of the

Federal Constitution. The Minnesota court refused to admit this plea, and entered judgment against the railroad. The state Supreme Court affirmed the judgment, but on writ of certiorari to the Supreme Court of the United States judgment was reversed, and the cause remanded.

Mr. Justice Sutherland delivered the opinion of the Court. The reasons which had supported the action of the Minnesota court were as follows:

The Minnesota supreme court held that the plea of *res judicata* was bad for two reasons: (1) that "the substantive right given the employee or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act"; and (2) that there was a lack of identity of parties, since under the Iowa statute the right of recovery is in the beneficiary while under the federal act the right is in the personal representative.

The learned Justice admitted that the federal act superseded all state laws in respect to claims arising from accidents occurring to employees engaged in interstate commerce, but pointed out that the question here was as to the power to decide that the employee was engaged in interstate commerce. He said:

The Iowa proceeding was brought and determined upon the theory that Hope was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point at issue was the same. That the Iowa court had jurisdiction to entertain the proceeding and decide the question under the state statute, cannot be doubted. Under the federal act, the Minnesota court had equal authority; but the Iowa judgment was first rendered. And, upon familiar principles, irrespective of which action or proceeding was first brought, it is the first final judgment rendered in one of the courts which becomes conclusive in the other as *res judicata*. (Citing cases.)

The Iowa court, under the compensation law, in the due exercise of its jurisdiction, having adjudicated the character of the commerce in which the deceased was engaged, that matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified. (Citing cases.) And, putting aside for the moment the question in respect of identity of parties, the judgment upon the point was none the less conclusive as *res judicata* because it was rendered under the state compensation law, while the action in which it was pleaded arose under the federal liability law.

The court's conclusion on the second point—that in the present case the requirement of identity of parties was satisfied—was expressed in the following paragraph:

Hope's death as the result of the negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the accident. In either case, the controlling question is precisely the same, namely, was the deceased engaged in intrastate or interstate commerce? and the right to be enforced is precisely the same, namely, the right of the widow, as sole beneficiary, to be compensated in damages for her loss. The fact that the party impleaded, under the state law, was the widow, and, under the federal law, was the personal representative, does not settle the question of identity of parties. That must be determined as a matter of substance and not of mere form. The essential consideration is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts. If a judgment in the Minnesota action in favor of the administrator had been first rendered, it does not admit of doubt that it would have been con-

clusive against the right of the widow to recover under the Iowa compensation law. And it follows, as a necessary corollary, that the Iowa judgment, being first, is equally conclusive against the administrator in the Minnesota action; for, if, in legal contemplation, there is identity of parties in the one situation, there must be like identity in the other.

The remainder of the opinion is devoted to a consideration of cases cited on this second point. In most of these, where it had been held that identity of parties was not present, there had been other rights involved besides those of the widow. He concluded:

Whether, in the light of the foregoing views, we now should hold that where, as in the *Troxel* cases, the rights of additional beneficiaries, not actual parties to the first judgment, are involved, the requirement of identity of parties is unsatisfied, is a question we do not feel called upon here to re-examine; since we are clear that such requirement is fully met in the situation now under consideration, where the sole beneficiary was an actual party to the proceeding under the state law, and present by her statutory representative in the action under the federal law, and no other rights were involved.

Argued by Mr. Edward S. Stringer for petitioner and Mr. Ernest A. Michel for respondents.

### War Risk Insurance

Under the terms of a War Risk Insurance policy a beneficiary named by the insured, who is not permitted to take at the time of the insured's death, may receive the award if Congress later includes him among the permitted class.

*White v. United States et al.*, Adv. Ops. 316, Sup. Ct. Rep. v. 46, p. 274.

A soldier in the United States army took out a War Risk Insurance policy upon his life and named his mother beneficiary. By his will he provided that his aunt should have half the proceeds. At that time aunts were not among the class of relatives permitted to be beneficiaries. After the soldier's death, Congress enlarged the permitted class to include aunts. The mother filed a petition to establish her rights to the entire proceeds. The District Court for the Eastern District of Virginia decided in favor of the aunt. Upon appeal, the Supreme Court affirmed the judgment.

Mr. Justice Holmes delivered the opinion of the Court. He said:

The certificate of insurance provided in terms that it should be "subject in all respects to the provision of such Act (of 1917), of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract." These words must be taken to embrace changes in the law no less than changes in the regulations. . . . The language is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them if not paternal was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the government's hands to that extent no one else could complain. The only relations of contract were between the Government and him. White's mother's interest at his death was vested only so far as he and the Government had made it so, and was subject to any conditions upon which they might agree. They did agree to terms that cut her rights down to one-half. She is a volunteer and she cannot claim more."

Argued by Mr. Alexander T. Gordon for appellant and by Solicitor General Mitchell for appellees.

# SOME COMPARATIVE ASPECTS OF CIVIL PLEADING UNDER ANGLO-AMERICAN AND CONTINENTAL SYSTEMS

Freer Rein Allowed Parties in Advancing Respective Pretensions Distinguishes Continental  
Methods of Pleading from Our Own—Form and Composition of Pleadings—Judicial  
Aid in Pleading—Relation of Pleadings to Judgment—Our Procedural Institu-  
tions More and More Approximating the Continental

By ROBERT WYNESS MILLAR

Professor of Law, Northwestern University

## § 1. Introduction

IN none of the Continental systems do we find a term of art precisely corresponding to our word "pleading." "Allegation" and "prayer" have their exact equivalents; "complaint," "answer," "replication," "counter-claim" and the like, their equivalents more or less exact; but for a technical expression denoting the sum of the rules governing the framing and presentation of allegation and prayer, we shall search their procedural vocabulary in vain. Our word, of course, is of French descent, but acquired its specialized sense after adoption.<sup>1</sup> In France, today, the verb "*plaider*" has substantially the same meaning as the English "plead" in its popular usage, and the noun "*plaidoirie*" has especial reference to the argument of counsel at the hearing. This difference in terminology reflects a difference in attitude. The learning of allegation occupies no such prominent place as with us. I doubt if, in the whole range of Continental procedural literature is to be found a treatise exclusively concerned with the subject. Such exposition as there is comes, for the most part, either as incidental to the treatment of specific procedural institutions or else in subordinate chapters of general works on procedure. The reason, however, is not far to seek. The existence in the English law of the institution of trial by jury, with the persistence there of the Germanic conception that the parties shall, by operation of their own words, themselves formulate the question for decision, accounts for the severely disciplined method of allegation developed in the English common law courts: without severity of discipline, the underlying principle could not have been kept in application. And, although the same reason did not exist for the court of chancery, this, in its formative period, could not well escape the common law influence; that influence, combined with the unfortunate expedient of utilizing the bill itself as part of the machinery of discovery, operated to enclose equity pleading, too, within a network of rules, albeit less rigid in character than those of the sister system. In the Continental countries, on the other hand, there has been little to interfere with the idea that, the cause being tried by the court alone, the parties may be allowed a fairly free rein in advancing their respective pretensions, since the judge can be depended upon to make the necessary eliminations, adjustments and reduction to logical order as a preliminary of decision.

(a) A paper read before the Round Table Conference on Remedies at the annual meeting of the Association of American Law Schools, Chicago, December 30, 1925.

1. See Stephen, *Pleading*, Appendix, note 1.

It is this idea, therefore, which has informed the Continental methods of pleading and which, as a common characteristic, distinguishes them from our own. But they vary from our own in still other respects and, as between themselves, present specific differences of an important character. A glance at the ensuing contrasts may thus be of interest.

## § 2. Form of the Pleadings

As an institution of English law, oral pleading had completely given way to the written before the end of the 1500s.<sup>2</sup> In France, however, the old orality succeeded in maintaining a foothold throughout the centuries until securely established by the existing Code, that of 1806.<sup>3</sup> In Sweden, too, oral pleading has never ceased to be utilized.<sup>4</sup> In Germany the procedure which grew out of the reception of the Neo-Roman law in the 1400s and 1500s soon abandoned the oral form and installed the requirement of writing not only for the pleadings but for virtually all proceedings in the cause.<sup>5</sup> A similar result was later produced in Denmark and Norway.<sup>6</sup> But in the early years of the 1800s the Napoleonic domination of the Rhine provinces introduced the Germans to the orality of the French procedure. In the decades immediately following, reaction against the tedious processes of the old written procedure eagerly seized upon orality as a watchword of reform. Various state legislations proved receptive and finally, in 1877, the national code establishing a uniform law of procedure for the Empire enacted the French principle as one of its bases.<sup>7</sup> In 1895 Austria adopted the same principle, to be imitated by Hungary in 1911 and Norway in 1915. Denmark in 1916 remodeled its procedure so as to admit the principle in general, but with a more qualified application to the pleadings. As for Italy, whither, too, the Napoleonic armies carried French law, the ordinary form of procedure which rests upon the Code of 1865 and the law of 1901 is one oral at least in theory.<sup>8</sup> Nevertheless, its pleadings are sufficiently different from the French to be assignable to the written category,<sup>9</sup> although as easily capable of change as those of the oral systems. Spain has experi-

2. Holdsworth, *History of English Law* (3d ed.) III, 641 et seq.

3. Chiovenda, *Romanesimo e germanismo nel processo civile*, §11, in *Rivista italiana per le scienze giuridiche*, XXXIII, 240.

4. Wrede, *Das Zivilprozessrecht Schwedens und Finnlands*, 44 et seq.; Broomé, *Den Alimäns Civilprocessen*, §20.

5. Planck, *Lehrbuch des deutschen Zivilprozessrechts*, §40.

6. Ipsen, *Den Danske og Norske Process*, §17; Hagerup, *Foredlæsninger over den Norske Civilproces* (1908) §14.

7. See in this regard Millar, *Formative Principles of Civil Procedure*, 17, *Illinois Law Review* XVIII, 108; *Id.* *The Recent Reforms in German Civil Procedure*, *American Bar Association Journal*, X, 703.

8. Chiovenda, *Principii di diritto processuale civile* (3d ed.) 708.

9. *Ibid.*, 681, 709.

enced no such procedural vicissitudes as Italy and Germany. The provisions of the *Partidas* in the 1200s contemplated the exclusive use of written pleadings, in all but petty causes,<sup>10</sup> and such alternative recognition of oral statement as appears in later legislation failed to leave any permanent impression.<sup>11</sup> Accordingly, the written form continues to be the one followed by the Spanish procedure.

In sketching the resulting methods, characteristic of the ordinary procedures of these jurisdictions, we begin, therefore, with *France*. Here the action is instituted by a written summons (*ajournement*), which serves also as a complaint, since it is required to contain a specification of "the object of the demand and a summary statement of the grounds."<sup>12</sup> Within a stated period after appearance, the defendant may deliver an answer (*défense*), but is not required to, and cannot be defaulted for lack of it. A further period is allowed for a reply (*réponse*), which the plaintiff likewise is free to omit. These preliminary writings by way of answer and reply condition neither proof nor relief, and are intended solely to give notice of what the future allegations are to be.<sup>13</sup> Apparently, as actually applied, they serve this purpose but poorly, since we are told that in practice they are "no more than a means of running up fees for the *avoués*."<sup>14</sup> But, at least three days before the hearing, the parties are required to exchange the so-called "*conclusions*" on which they intend to rely, consisting for each of his formal prayer, preceded by a statement of its supporting grounds both of fact and of law. And it is the oral repetition of the respective *conclusions* at the hearing itself wherein are to be discovered the true pleadings of the French law.<sup>15</sup> The German system represents an adaptation of the same idea. There is first a written complaint (*Klageschrift*) which, served upon the defendant, fixes a day for the initial hearing. Prior to the hearing, the defendant should deliver an answer, and there should be such further exchange of written allegation as is called for by the circumstances of the case. This process is informational and precursive only; and the papers in question are specifically known as preparatory writings (*vorbereitende Schriftsätze*).<sup>16</sup> Moreover, they are in no sense compulsory. If a party fails thus to notify his opponent of the pretensions which he will advance at the hearing and so necessitates a continuance, he is subject to costs; or it may be that judgment by default will be withheld until the non-appearing adversary has been better advised; otherwise, omission to employ these writings can work no prejudice.<sup>17</sup> The significant altercation of the parties is that which occurs at the hearing. Here each side presents orally its prayers and allegations, with which step come into existence, for the first time, the true proof and relief conditioning pleadings, substantially as in the French system.<sup>18</sup> But with the Germans the principle of orality was pushed to an astonishing extreme. The general rule under the Code was that nothing could be taken into consideration as a basis for judgment other than what had been the subject of oral presentation.<sup>19</sup> For instance, while a given state-

ment contained in a preparatory writing might, under circumstances, be accorded the evidential value of an extra-judicial admission, just as if contained in a letter or other private writing,<sup>20</sup> it could never be binding upon the party as a judicial admission, unless it had been orally reiterated.<sup>21</sup> Again, if at the hearing the party were to lay before the court an item of documentary evidence mentioned in his complaint or answer, unless he made, either of his own volition or at the instance of the court, some express oral reference to this evidence, the court would be powerless to act upon it.<sup>22</sup> The peculiar formalism thus developed was one of the principal causes of the reform measure of 1924, which, in considerable degree, has brought about a more rational attitude toward the principle of orality. In particular, it is now expressly allowable for the party, with the permission of the court and in the absence of objection from the other side, to refer to the contents of his preparatory writing, in lieu of making the specific oral presentation originally required.<sup>23</sup> The Austrian Code of 1895, which is uniformly admired on the Continent for its scientific construction, took over the German plan of preparatory writings and oral allegation, but with certain important modifications. The first step is a written complaint similar to the German.<sup>24</sup> At the initial hearing, the defendant is required to announce orally certain specified preliminary defenses. When this has been done or no such defenses appear, an order is entered requiring the interposition of a written answer, which may be followed by a further exchange of preparatory writings.<sup>25</sup> But, while the answer is thus a preparatory writing and not a true pleading, it has here the special significance that failure to interpose it may result in the defendant being defaulted.<sup>26</sup> Moreover, in this system, an admission occurring in the answer or other preparatory writing is effective without oral repetition.<sup>27</sup> On the other hand, no substitute is permitted for the oral allegations at the hearing.<sup>28</sup> Hungary, in the Code of 1911, exhibits a variation of the Austrian system. A written complaint is here, too, the first step.<sup>29</sup> By an adherence to Romano-canonical principle, the initial hearing is made to serve the purpose of bringing about the *constitutio iudicii*.<sup>30</sup> That is to say, after the plaintiff has orally stated his claim—ordinarily by signifying his intent to abide by his written complaint—and dilatory exceptions, if any, have been disposed of, the defendant is required to contest the suit by reading his written counter-prayer (*Gegenantrag*). The cause having been thus constituted, a day is assigned for the hearing on the merits. In the ensuing interval occurs, if necessary, an exchange of preparatory writings.<sup>31</sup> Including the circumstance that an avowal of fact occurring in this exchange can amount per se to no more than an extra-judicial admission,<sup>32</sup> the writings in question, for the most part, have only the same significance as under the original German provisions,<sup>33</sup> that is, as mere precursors of the oral allegation and prayer to come at the

10. *Ibid.*, I, 322, 337, 355 note 27.

11. *Ibid.*, I, 331; Hellwig, *op. cit.*, I, 436, 529.

12. Planck, *op. cit.*, I, 187.

13. Zivilprozessordnung (revision of 1924) §137. By this provision statutory recognition was extended to a practice which had already grown up in the courts of the larger cities. Hellwig, *op. cit.*, 525.

14. Zivilprozessordnung, §226 et seq.

15. *Ibid.*, §239, 243, 74 et seq., 176.

16. *Ibid.*, §298; Schwartz, *Vierhundert Jahre deutscher Civilprozess-Gesetzgebung*, 709.

17. *Ibid.*, §266.

18. *Ibid.*, §177.

19. Zivilprozessordnung, §129.

10. Leyes 40 and 41, Tit. II, Part. 3.  
11. See Fehrero, *Libreria de escribanos*, (1790) Pt. II, Bk. I, no. 30; Hevia Bolaños, *Curia philippica* (1771) p. 62.

12. Code de Procédure, §61.

13. Glasson and Tissier, *Précis de procédure civile* (2d ed.) I, 424-427.

14. *Ibid.*, 427.

15. *Ibid.*, 441-442; Cuche, *Manuel de procédure*, 390, 309.

16. See Millar, *Formative Principles of Civil Procedure*, III, Law Rev. XVIII, 109-110; *Id.* The Recent Reforms in German Civil Procedure, *Am. Bar Assn. Journal*, X, 703.

17. Hellwig, *System des deutschen Zivilprozesses*, I, 529-530.

18. *Ibid.*, 524, 529.

19. Planck, *Lehrbuch des deutschen Civilprozessrechts*, I, 183.

20. Plósz, *Der Bau des Prozesses in erster Instanz nach der ungarischen Zivilprozessordnung in Zwei Vorträge aus dem ungarischen Zivilprozessrecht*, 47, 52.

21. Zivilprozessordnung, §§178, 180, 185, 191, 194 et seq.

22. *Ibid.*, §§263, 203.

23. Plósz, *op. cit.*, 76.

hearing. Indeed, reference to their contents at the latter, in lieu of oral presentation, is expressly forbidden.<sup>34</sup> In the *Norwegian* Code of 1915 is disclosed another variant of the oral method. Here, upon the plaintiff presenting his notice of action (*stevning*), the judge is to determine whether the cause will best be prepared by exchange of preparatory pleadings or by personal appearance of the parties.<sup>35</sup> Of this decision the defendant is apprised by means of the summons (*indkaldelse*) served along with the notice of action.<sup>36</sup> In the one case, failure of the defendant to answer in writing or to appear and answer orally, in the other, his failure to appear for preliminary statement, is ground for default.<sup>37</sup> Thus the place of the ordinary preparatory writing may be taken by a preliminary oral statement, which the judge reduces to form and causes to be minuted of record.<sup>38</sup> The written answer may be followed by other preparatory pleadings if the parties elect and, where the circumstances require, the court is free to call for such further writings or for further preliminary oral statement.<sup>39</sup> An admission occurring in the course of these preliminary writings or preliminary oral statements is binding upon the party<sup>40</sup> and, in other respects, their relation to the actual pleadings at the principal hearing is very similar to that of the preparatory writings under the Austrian Code. A less unreserved acceptance of the principle of orality in its application to allegation and prayer characterizes the *Danish* Code of 1916. While influenced by the Austrian law in various respects, it has to an important extent followed a course of its own in the matter of the pleadings. The proceeding opens with a notice of action (*Stævning*)<sup>41</sup> which, as in the Norwegian law, is in effect a written complaint. At the initial hearing the defendant is required to present a written answer and for want of it may be defaulted.<sup>42</sup> The answer may be followed by the plaintiff's written reply and a written rejoinder from the defendant, delivered within such times as the court shall appoint. Only exceptionally can this series of writings be extended.<sup>43</sup> The answer is required to present all preliminary and dilatory defenses (*Formalitetssindsigelse*) and may state or reserve the defenses on the merits (*Realitetssindsigelse*). Accordingly, the preparatory pleadings as to the merits may be preceded by a separate set of such writings addressed to the formal defenses and looking to their preliminary disposition.<sup>44</sup> The principal distinctive feature of the Danish system, however, concerns the relation of these writings to the orality of presentation at the principal hearing. Their use is parcel of the activity expressly referred to as "preparation" (*Forberedelse*),<sup>45</sup> and the law makes it abundantly clear that, in general, it regards oral expression as the touchstone of allegation and prayer.<sup>46</sup> Nevertheless, it explicitly declares that the hearing shall "proceed on the basis of the writings exchanged and of the record."<sup>47</sup> Consequently, it has a stricter attitude than is generally the case toward the party who at the hearing would materially vary from the contents of his preparatory writings. If a continu-

ance would be necessitated by such variant allegations or prayers, it directs their disallowance, upon motion to that effect, except where excuse is made to appear for the belated presentation.<sup>48</sup> While, in the other oral systems the court is given a discretionary power of greater or less extent to exclude delayed presentation,<sup>49</sup> the Danish law alone provides for this mandatory disallowance of new allegation and prayer on the specific ground of variance between the preliminary and the definitive pleadings.

*Sweden*, in the present regard, stands apart from its Scandinavian neighbors. Its procedural law dates from 1734, without structural change. The situation here, therefore, remains unaffected by that current of influence emanating from the German Code of 1877. Under the Swedish system, the suit is begun by a summons or notice of action (*stämning*), prepared or at least issued by the judge, which contains a brief identification of the plaintiff's claim.<sup>50</sup> The pleadings, by the terms of the law, are to be oral, except where "the importance and complication of the cause or other circumstances" require the use of writing;<sup>51</sup> in effect, they may be oral or written, largely as the parties elect.<sup>52</sup> On the return day, the plaintiff either makes an oral statement of his prayer and its grounds or lays before the court a written complaint or libel to like effect. The defendant, on his part, either makes oral answer forthwith or else is allowed time to present a written answer. Ordinarily, where written pleadings are used, they are restricted to the two, complaint and answer. Under proper circumstances the court has power to require the parties to reduce their oral statements to writing; in all cases it causes the oral statements to be minuted of record.<sup>53</sup> The oral form is the one more commonly employed outside the larger cities.<sup>54</sup> In this system, it will be observed, there are no preparatory pleadings of any sort; if the complaint or answer is made orally it is at once a true pleading; if made in writing it is equally so, and requires no oral repetition. What has been said of Sweden applies with but slight variation to Finland, whose procedure, also, rests upon the Swedish Code of 1734.

Quite different considerations govern the pleadings of the Italian law. The Code recognizes two main forms of procedure, the formal and the summary. The first named proceeds on the theory of a basis for judgment fixed by written allegation and prayer, and, once fixed, incapable of change. But, as this form is now seldom used, it need not detain us here. In practice, under the Code, the summary procedure had become the ordinary form and as such was re-regulated and improved by the law of 31 March, 1901, so that it may be regarded as containing the system typical for Italy.<sup>55</sup> According to this system, there is a written summons closely resembling that of French law but calling for appearance on a specified day. There is no such thing as default for want of a written answer, but at the initial hearing thus appointed by the summons and at such adjournments of it as may be necessary or permitted, the parties may exchange written pleadings known as "*compare*," setting forth their

34. *Zivilprozessordnung*, §210.

35. *Lov om rettergangsmåten for tvistemål*, §§299, 300, 302. If without counsel, the plaintiff may have the written notice of action prepared by the court. *Ibid.*, §§299, 319.

36. *Ibid.*, §§303, 313.

37. *Ibid.*, §§303, 313, 344.

38. *Ibid.*, §304.

39. *Ibid.*, §§119 *et seq.*, 317.

40. *Ibid.*, §154. Cf. §314.

41. *Lov om Rettens Pleje*, §337.

42. *Ibid.*, §343.

43. *Ibid.*, §344.

44. *Ibid.*, §§343, 345.

45. *Ibid.*, Kap. 32, Title and *passim*.

46. *Ibid.*, e.g. §§148, 292, 279, 341.

47. *Ibid.*, §366.

48. *Ibid.*, §366.

49. *Germany*, *Zivilprozessordnung*, §279; *Austria*, *Zivilprozessordnung*, §179; *Hungary*, *Zivilprozessordnung*, §222; *Norway*, *Lov om rettergangsmåten for tvistemål*, §335.

50. *Rättegångsbalken*, c. 11, §§1, 3, 6; *Broomé*, *Den Allmänna Civilprocessen*, §21; *Wrede*, *Das Zivilprozessrecht Schwedens und Finnlands*, 178.

51. *Rättegångsbalken*, c. 14, §1.

52. *Wrede*, *op. cit.*, 169, 186, 190; *Broomé*, *op. cit.*, §23.

53. *Wrede*, *op. cit.*, 186, 190, 45.

54. *Wrede*, *op. cit.*, 45.

55. See Millar, *Formative Principles of Civil Procedure*, III. Law Rev., XVIII, 111.

respective pretensions.<sup>56</sup> The theory of the law is that, under ordinary circumstances, there shall be but one of these from each side—the so-called “*comparsa conclusionale*,” but it seems to be customary, under the practice as developed, to exchange certain preliminary writings of like character, upon whose number no limit is set.<sup>57</sup> These *comparses*, therefore, contain the allegation and prayer on which the principal hearing proceeds.<sup>58</sup> But, while the pleadings of the Italian system therefore subscribe to the written principle, the difference between them and the pleadings of the oral system is, in one sense, but nominal, since, subject to the usual rule against changing the cause of action, the parties are free to alter and modify their allegations down to the very close of the hearing. It should be added, for Italy, that a new code of procedure is now on the anvil; the indications are that the result will be an even closer approach, in pleading, to the Austrian and kindred systems.

Finally we come to Spain, and here, strangely enough, we can feel slightly more at home so far as pleading is concerned. The present Code, enacted in 1881, has in nowise departed from the traditional principle of written allegation and prayer. Apart from the matter of dilatory exceptions, but four pleadings ordinarily occur, the petition (*demanda*), the answer (*contestación de la demanda*), the replication (*réplica*) and the rejoinder (*dúplica*).<sup>59</sup> It seems to be the principal office of the replication and rejoinder not so much to advance the stage of allegation as to recapitulate in ampler and more specific form the allegations and prayers of the complaint and answer: they are required to “fix definitely and concretely the points of fact and law” upon which the cause will turn.<sup>60</sup> The only other pleadings allowed are such as set forth facts newly arisen or newly coming to notice (*escritos de ampliación*).<sup>61</sup> On the written basis thus arrived at, the cause must progress to judgment.<sup>62</sup> Not only is the latitude of change generally permitted under the other Continental systems here entirely unknown, but the court, furthermore, is without that discretionary power of allowing amendment which characterizes our own system.

### § 3. Composition of the Pleadings

It has already been indicated that the structure and content of the several pleadings in the procedures noted conform to no such regimen as in our own. The distinction between evidentiary and ultimate facts is not enforced in the same way as with us; departure is not a fault except as it may introduce a new cause of action; argumentative allegations are of usual occurrence; and allegations of law are not excluded—indeed, in some systems are expressly prescribed. Naturally, however, there is the parallel of that distinction which we take between allegations of fact and of legal conclusion: so the German *Tatsachenbehauptung* as opposed to *rechtliche Schlussfolgerung*.<sup>63</sup> Thus, also, the “simple fact” is contrasted with the “legal fact,”<sup>64</sup> and (by a similar though not identical distinction) the

“concrete legal relation” with the “abstract legal relation.”<sup>65</sup> In the present regard should be mentioned the contraposition, especially in the German procedural doctrine, of the theories of “individualization” (*Individualisierung*) and “substantiation” (*Substantiierung*). A demand is individualized, in this sense, when just enough has been stated to identify it, to give it an individual character, to differentiate it, that is, from other demands of like nature, especially for purposes of *res judicata*. Substantiation, on the other hand, exists when the underlying facts, that is to say, the substantial elements of the demand, are made to appear.<sup>66</sup> To a certain extent this distinction corresponds to that which the Anglo-American law makes between facts and legal conclusions; to a certain extent it harmonizes with our distinction between ultimate and evidentiary facts; to a certain extent it goes farther and affects the statement or non-statement of what we would deem essential elements of the cause of action. An example of the last sort is afforded by the case of a plaintiff suing upon a contract which contains a condition precedent to the accrual of the defendant's liability. The claim would be individualized without an explicit statement of the performance of the condition precedent, on the view that the plaintiff's prayer for judgment makes it clear that he is relying upon the fact of performance.<sup>67</sup> The German Code leaves it doubtful whether in the written complaint the demand has to be individualized only, or substantiated, and the question has been a long standing subject of dispute among procedurists. Although the *Reichsgericht* (the Supreme Court) has, with some qualification, declared for the substantiation theory,<sup>68</sup> the more authoritative writers continue to maintain that the opposite theory is the correct one. We hasten to add that the controversy is confined to the written complaint. So far as concerns the oral allegations at the hearing, neither the German Code,<sup>69</sup> nor any of the legislations which it has influenced, fail to make it clear that these must at all times be substantiated or, in other words, must consist of the averment of concrete facts in the full measure necessary to support the relative prayer, a requirement which commonly seems to involve the statement of what we would call “evidentiary facts.”

Of the character of averments used in the preparatory writings of the German system, as foreshadowing the oral allegations at the hearing, some idea may be had from the following examples in the supposititious case of *Castor v. Benno*, appearing in Stölzel's *Schulung für die civilistische Praxis*.<sup>70</sup> The complaint, omitting formal parts, states that the plaintiff summons the defendant to a specified session of court, at which

“I shall pray that the defendant, against the delivery of Hörder shares of the par value of 10,000 marks, be condemned to the payment of 11,000 marks, together with 6 per cent interest from the day of service of the complaint and that the judgment be declared subject to immediate execution.

“The defendant (continues the complaint) on March 5, 1890 purchased from the plaintiff Hörder shares of the par value of 10,000 marks, at 110, subject to immediate

56. Codice di procedura civile, §§132, 134, 390; Legge 31 marzo, 1901, §§1, 8; Chiovenda, *Principii di diritto processuale civile*, 708 et seq., 770-773.

57. Mortara, *Istituzioni di procedura civile*, 194.

58. Chiovenda, *op. cit.*, 709-710.

59. Ley de enjuiciamiento civil, §§524-549.

60. *Ibid.*, §548.

61. *Ibid.*, §§563, 564.

62. Manresa, *Comentarios á la ley de enjuiciamiento civil*, II, 101, III, 107, 143.

63. See e.g. Stölzel, *Schulung für die civilistische Praxis*, I Theil, p. 297.

64. *Fatto semplice, fatto giuridico*, Chiovenda, *Principii di diritto processuale civile*, 206, 779-780.

65. *Konkretes Rechtsverhältnis, abstraktes Rechtsverhältnis*, Hellwig, *op. cit.*, 309, 309.

66. Hellwig, *op. cit.*, 309 et seq.; Heifron and Pick, *Lehrbuch des Zivilprozessrechts* (3d ed.) I, 563; Engelmann, *Der Zivilprozess: Allgemeiner Theil*, 68.

67. Pagenstecher, *Substantiierung oder Individualisierung?* in *Rheinische Zeitschrift für Zivil- und Prozessrecht*, XII, 476.

68. Pagenstecher, *op. cit.*, 471.

69. See e.g., Heifron and Pick, *op. cit.*, I, 562-563.

70. I Theil, Beilageheft, 14-16.

delivery and payment in cash. (Proof: Oath)<sup>71</sup> Inasmuch as the defendant has refused to accept the shares or pay the purchase price, the above prayer is justified."

To which comes the answer:

"The defendant . . . will pray that the complaint be rejected as unfounded, with costs to the defendant."

"The defendant denies that he purchased from the plaintiff the shares in question."

"The state of the case is as follows: On March 5, 1890, the plaintiff called the defendant on the telephone. Then ensued the following conversation: The plaintiff telephoned: 'This is Adam Castor. Who is there?' He received the answer: 'Wilhelm Benno.' Then the plaintiff asked: 'Will you take from me Hörder shares, par value 10,000 marks, at 110 cash?' The answer was: 'My principal is out. I shall tell him about it.' Thereupon, the plaintiff rang off. Consequently no contract of purchase was arrived at."

Now it is the plaintiff's turn. He says:

"The defendant has not fully set forth the dealings of the parties. Admittedly there took place the telephone conversation as stated by the defendant. But some hours after the conclusion of that conversation, Wilhelm Benno who had meantime returned, called the plaintiff on the telephone, and, after the plaintiff had announced himself as present, said: 'I will take Hörder shares, par value 10,000 marks, at 110 cash.' (Proof: Oath) Through the last mentioned declaration the purchase was effected. I therefore abide by the prayer of the complaint."

But the defendant has this further to say:

"As to the statements of the plaintiff, and with renewal of my prayer, I declare:

"Even if the further conversation alleged by the defendant and admitted by the plaintiff was followed by the later telephone conversation alleged by the plaintiff, nevertheless a contract of purchase has not been affected between the parties. For, under Art. 319 of the Commercial Code,—which provides that 'an offer to conclude a commercial transaction made between parties who are in the presence of each other, must be immediately accepted, otherwise the offeror is not bound by his offer,'—the first offer of the plaintiff had to be immediately accepted, if it were not to be considered as withdrawn. With the close of the telephone conversation, the offer was thus withdrawn. Through the alleged acceptance of the offer—already withdrawn—occurring some hours later, a contract of purchase could not be brought about. Accordingly, the defendant's refusal to accept or pay was justified."

So end the pleadings. But what a riot of disorder they would present to a common law lawyer! No observance of any rule restricting to point-blank denial as an alternative of confession and avoidance, the allegation of evidence, the allegation of legal conclusions, the interposition of what is tantamount to a demurrer in the form of a rejoinder,—a demurrer moreover, which not merely makes the legal point but argues it. Yet, given a knowledge of the system, there can be little confusion as to the issues. The parties, indeed, are even better prepared to go to a hearing than under most of the American systems. The case presented, however, is a comparatively simple one. It can readily be seen that, for a complicated situation, pleadings of this sort afford the possibility of developing a tangle whose unravelling must impose a serious burden upon the court.

Time will not permit us to linger on the present topic. We may note, however, that the Austrian<sup>72</sup> and Norwegian<sup>73</sup> Codes contain provisions discouraging argument of law and fact in the pleadings. The Italian<sup>74</sup>

and Spanish<sup>75</sup> Codes, on the other hand, call for a statement of the legal grounds of the party's prayer. This is also the French rule, in part resting on the Code.<sup>76</sup> In Italy, more especially, the pleadings may even extend to a discussion of the evidence, which, although not yet laid before the court is known to the parties in the form of documents or witness-depositions. An example of the Italian *comparsa conclusionale* given in Chiovenda's *Principii*<sup>77</sup> would have as its nearest analogue in our procedure a short brief and argument presented to the trial court in an equity cause, with the addition of the party's prayers set out at length. And the reason for this form becomes apparent when the author gives us to understand that, as a common thing, the cause is submitted on these *comparsa* without oral discussion.<sup>78</sup>

#### § 4. Judicial Aid in Pleading

We all know how in the old days of oral pleading in the English courts, it was not unusual for the judges to advise the parties in the framing of their allegations. This form of judicial activity the German and kindred legislations have raised to the plane of express duty. The original provision of the German Code here in question was made more effective in the reform of 1924. According to the present text, "the President has to see to it that the parties fully declare themselves as to all relevant facts and set forth suitable prayers, and especially that they amplify the insufficient allegation of facts advanced. To this end, he must, so far as necessary, discuss the law and facts of the case with the parties and interpose necessary questions."<sup>79</sup> The Austrian provision does not specifically call for this discussion, but is otherwise not dissimilar.<sup>80</sup> The same may be said of the Hungarian.<sup>81</sup> The Norwegian, in part following the Austrian phrasing, is much briefer, but equally to the point: "The President of the court by questioning or other communication with the parties must see that their declarations are as clear and complete as possible."<sup>82</sup> And, by the Danish law, "the court through appropriate questions to the parties must endeavor to rectify any ambiguity or lack of clearness or completeness occurring in their presentation of the cause or other declarations."<sup>83</sup>

In Sweden, the law contains no such distinct injunction. Nevertheless, with a view to correction of improper allegation and prayer it makes provision for oral examination by the court of a party who has pleaded in writing. And in all cases it is the practice of the court to elicit from the party any declarations that may be necessary to a sufficient presentation of his claim or defense.<sup>84</sup>

#### § 5. The Principle of Admission by Failure to Deny

From the ancient Germanic law comes the rule that, in allegation, the party admits what he does not deny; from the Roman, the opposite rule, namely, that nothing is admitted save what is expressly admitted. The history of our own procedure illustrates this contrast, since the common law followed the Germanic

giudizario, 1921; Chiovenda, *Principii di diritto processuale civile*, 770.

75. Ley de enjuiciamiento civil, §1524, 548.

76. Cuche, *Manuel de procédure*, 300, 800; Code de procédure civile, §61.

77. *Principii di diritto processuale civile*, 770 et seq.

78. *Ibid.*, 661.

79. Zivilprozessordnung, §139.

80. Zivilprozessordnung, §132.

81. Zivilprozessordnung, §225.

82. Lov om rettergangsmaaten for tvistemål, §381.

83. Lov om Rettens Pleje, §289.

84. Wrede, *Das Zivilprozessrecht Schwedens und Finnlands*, 154, 187-188, 190; *Id.*, Die Parteivernehmung im Zivilprozess der nordischen Länder in Rheinische Zeitschrift für Zivil- und Prozessrecht, XII, 364 et seq.

71. The German Code (followed by the Austrian and Norwegian) requires an advance designation of the proof intended to be used in support of the particular allegation. In the present example, the reference is to the decisory oath (see Millar, *Formative Principles of Civil Procedure*, III, Law Rev. XVIII, 95 et seq.) which the plaintiff is tendering to the defendant. Here, however, the tender is without a proper subject matter, because the allegation that the shares were 'purchased' is not a statement of fact but a legal conclusion. Stölzel, *op. cit.*, I, 59, 318.

72. Zivilprozessordnung, §78.

73. Lov om rettergangsmaaten for tvistemål, §122.

74. Codice di procedura civile, §§134, 176; Regolamento generale

rule and the chancery, in the main, the Roman. So, in Illinois, today, these opposing rules are respectively administered on the two sides of the court. But, in the late Middle Ages, the Romano-canonical law invented as an alleviation of the Roman rule, the procedure of positions, by which the party could be compelled to make explicit declarations to specifically articulated facts upon pain of having these taken as confessed.<sup>85</sup> This positional procedure, as is well known, served to originate the classic system of discovery in the English chancery.<sup>86</sup> The development, however, which this institution underwent in England was markedly different from that which it experienced on the Continent and especially in the later stages of the German common law procedure, that is to say, the system which took form after the reception of the Roman law. We cannot stop for details: suffice it to say that it was the transformation undergone by the positional procedure in the German common law system and not, as with us, the continuity of the original Germanic idea to which is owed the adoption by the German Code of 1877 of the principle that what is not denied stands admitted.<sup>87</sup> "Each party," says the Code, "has to declare himself as to the facts alleged by his adversary. Facts which are not expressly denied are to be considered admitted, unless the purpose to deny them appears from the other declarations of the party. A declaration of no knowledge is permitted only as to facts which do not represent personal acts of the party or have not been the subject of his personal perception."<sup>88</sup> The Austrian Code is less drastic, since in the absence of an express admission it allows the court to say whether or not the fact in question shall be taken as admitted.<sup>89</sup> The Hungarian law treats as admitted facts not denied expressly or by necessary implication, but as to statements of lack of knowledge or recollection follows the Austrian rule.<sup>90</sup> Denmark<sup>91</sup> and Norway,<sup>92</sup> like Austria, leave it to the court, generally, to determine the effect of failure to deny.

The case is quite otherwise in Sweden. Here is retained in its entirety the basic Romano-canonical rule of no admission save an express admission. The Swedish law, we are told, "requires proof not only of the facts denied by the adversary, but also of those with respect to which he is silent, thus, in general, where no express admission appears."<sup>93</sup>

Not so extreme in their adherence to the last mentioned rule are France and Italy. Both, accepting the rule generally, make exception for the case of documents.<sup>94</sup> If a party would assail the genuineness of a document alleged by his adversary, he must expressly deny it to be his, or, in case of a third party's document, state that he cannot recognize it as genuine.<sup>95</sup> Moreover the general rule is largely neutralized by the fact that, under both systems, as a matter of proof, either party may cause the other to be examined upon written articles,—a measure which had its historical source in

the old procedure of positions.<sup>96</sup> Failure to appear or refusal to answer, under the Italian law,<sup>97</sup> results in confession of the articulated facts; under the French,<sup>98</sup> gives the court discretionary power to treat them as confessed. As an alternative, the French Code provides for an oral examination in open court, without articles, known as examination by "personal appearance" (*comparution personnelle*), in which, according to the view now prevailing, refusal to answer has the same effect as in the articulated proceeding.<sup>99</sup>

The Spanish Code approaches the question in a different manner. It will be recalled that, in the normal case, it provides for but four pleadings, namely, petition, answer, replication and rejoinder. To question the genuineness of a document in whatever pleading alleged, the party must do so expressly.<sup>100</sup> For the rest, we must take a distinction. With respect to the answer in its relation to the petition, it does not appear that failure to deny a particular fact operates as an admission. But, as to the replication and rejoinder, on the contrary, it is specifically declared that the pleader shall "confess or deny fully the facts prejudicial to him" alleged by his adversary. "Silence or evasive responses may be taken, in the judgment, as confession of the relative facts."<sup>101</sup> The rule here in question is an innovation of the present Code,<sup>102</sup> and the fact that it is made applicable only to this later stage of the pleadings is undoubtedly explained by the recapitulatory character of the replication and rejoinder, as also by the intention that the rule should serve in some sort as a substitute for examination of the adversary by means of positions, through which alone, under previous legislation, the like confession could be obtained.<sup>103</sup> Nevertheless, a form of this positional proceeding, similar to the articulated examination of the French and Italian law, is still retained, as an additional means of securing admissions.<sup>104</sup>

#### § 6. The Relation of the Pleadings to the Judgment

As with us, it is a fundamental maxim in the legislations noted that the judgment shall conform to the pleadings and proof. *Judex judicare debet secundum allegata et probata*. But the particular application of this principle is not always quite the same as that to which we are accustomed. In this regard, a distinction is to be made between the prayer and the allegations proper. So far as concerns the prayer, our common law procedure never experienced any anxiety, for a prayer, in this sense, was something that it did not know. If the form of action and the allegations were supported by the proof and the *ad damnum* was not exceeded, the principle in question was satisfied. Prayers, to be sure, concluded the pleas and later pleadings, but these, for the most part, were of purely formal significance. In chancery, however, the prayer was a thing of importance and, in the procedure of the American codes, a similar importance has come to be attached to the prayer of the complaint even in common law actions. But, in both of these instances, the use of the general prayer has, to a certain extent, tempered the severity of the rule that the plaintiff must

85. Wetzell, *System des ordentlichen Civilprozesses* (3d ed.), 629-630; Zimmermann, *Der Glaubensid*, 166 et seq.

86. Langdell, *Summary of Equity Pleading* (3d ed.), 19 et seq., 45, 53.

87. Kohler, *Prozess als Rechtsverhältnis*, 47, note; Wetzell, *op. cit.*, 631.

88. *Zivilprozessordnung*, § 138.

89. *Zivilprozessordnung*, § 267.

90. *Zivilprozessordnung*, § 265.

91. *Lov om Rettens Pleje*, § 281.

92. *Lov om rettergangsmaaten for tvistemal*, § 184.

93. Wrede, *Das Zivilprozessrecht Schwedens und Finnlands*, 208, 230.

94. Chiovenda, *Principii di diritto processuale civile*, 749.

95. *Code de procédure civile*, § 1192 et seq.; *Code de procédure civile*, § 388 et seq. This is the rule for private documents; the like attack upon a public document can only be conducted by means of a special affirmative proceeding. *Code de procédure civile*, § 314 et seq.; *Code de procédure civile*, § 296 et seq.

96. *Code de procédure civile*, § 384 et seq.; *Codice di procedura civile*, § 216 et seq.; Chiovenda, *op. cit.*, 749, 819.

97. *Code de procédure civile*, § 330.

98. *Codice di procedura civile*, § 218; Glasson and Tissier, *Précis de procédure civile* (3d ed.), I, 903.

99. *Code de procédure civile*, § 428; Glasson and Tissier, *op. cit.*, 907-909.

100. Manresa, *Comentarios á la ley de enjuiciamiento civil*, III, 377, 245-7, 251.

101. *Ley de enjuiciamiento civil*, § 549.

102. Manresa, *op. cit.*, III, 143.

103. See Manresa, *op. cit.*, III, 144-146.

104. *Ley de enjuiciamiento civil*, § 579 et seq.

distinctly specify the relief which he would have the judgment award him. The progenitor of our general prayer was probably the so-called "*clausula salutaris*" of the Romano-canonical procedure,<sup>106</sup> by which the court was besought, *ex nobile officio*, to supply whatever was needful "in case the prayer could or should have been better framed."<sup>106</sup> In the Continental countries where it was employed, this clause, whatever its original effect, seems to have become a pure form,<sup>107</sup> with the result that relief, to be granted, had always to be specially stated. Such, at any rate, is the rule now rigidly insisted upon. As typical of the prevailing attitude may be cited the provisions of the French Code concerning the remedy against judgments known as "civil request" (*requête civile*). Here, among the grounds upon which this remedy may proceed is the fault of the judgment (a) in pronouncing upon things not demanded, (b) in adjudging more than has been demanded, and (c) in omitting to pronounce upon a given head of demand.<sup>108</sup> In Italy, as it happens, the like faults come within the province of cassation (*cassazione*)<sup>109</sup> and not within that of "revocation" (*revocazione*) which in general corresponds to the French civil request. But, regardless of the particular mode of attack, the judgment is everywhere vulnerable which exhibits a lack of conformity to the specific formulation of the prayer.

The case is not entirely the same as to the allegations of fact. In France the rule has been laid down by the Court of Cassation that the court is bound by the demand of the party but not by the grounds assigned in its support. And, in a cause where a plaintiff sought to have a holographic will declared void on the ground that it was not properly signed, a judgment was held valid which decreed the nullity on the ground of undue influence (*suggestion et captation*), although this had not been alleged in the plaintiff's conclusions.<sup>110</sup> The same doctrine obtains in Italy. A distinguished Italian writer, speaking of "the universally accepted principle that the court must judge *juxta allegata et probata*" finds it "scarcely necessary to add that the principle does not prevent the judge—indeed, rather impliedly authorizes him—to found his decision upon grounds of fact not alleged by the parties, but which emerge from the record."<sup>111</sup>

The opposite view, in keeping with that of our own system, is taken in Germany. Here the rule is that "although the aim of the proceeding is to establish the true state of facts, the court is only to take the facts into consideration so far as they have been alleged by the parties."<sup>112</sup> This rule was the one obtaining in Austria prior to the Code of 1895<sup>113</sup>, and continues under that Code.<sup>114</sup> Sweden seems to adhere to the same orthodox view.<sup>115</sup> And the Danish Code contains an express provision that the judgment "shall not take into consideration any grounds of action or defense

which have not been advanced by the parties."<sup>116</sup> Spain, likewise, falls into the orthodox group. The requirement, as stated in the Code, is that the judgment must be in accordance with the "demands and other pretensions seasonably alleged in the cause."<sup>117</sup> This, however, is considered merely declarative of the pre-existing principle dating from the *Partidas*. And under that principle it had been repeatedly held by the Supreme Court that there must be conformity to the manner and grounds of the demand, a judgment not being supportable if "founded on titles and reasons not presented or discussed in the course of the litigation."<sup>118</sup>

## § 7. Conclusion

The purposes of this paper have not permitted us to do more than to project against a familiar background an imperfect and more or less impressionistic outline of some of the more obvious features of the Continental systems, as related to the matter of pleading. Enough, perhaps, has been shown to indicate that, however variant their methods from those of the Anglo-American law, the effort is always the same as that which, in a modern day certainly, we would ascribe to our own, namely, that of developing the points of controversy in such wise as to do speedy and substantial justice, with the minimum of hardship to the party. Whether these methods present anything deserving of introduction in our own legislation is a question upon which no mere cursory survey can enable us to pass an opinion. At least, they claim our attention and invite our earnest study. English law and English procedure have drawn upon the Continent in the past; it may be further drafts are to be made in the future. In any event, if we consider the trend of English and American procedural reform in the past three-quarters of a century—the fusion of law and equity, the abolition of forms of action, the liberalization of joinder of parties and of causes of action, the remodeling of the written interrogatory and its introduction in common law causes, the reception of the declaratory judgment, the abolition of the demurrer, the increased scope of the cross-action, and the gradual removal of artificial rules of allegation—we are bound to admit that the inexorable logic of events is approximating our procedural institutions more and more to those in use on the Continent.

116. And this "even though it may appear from the hearing that such could have been utilized." *Low on Retiens Pleje*, § 298.

117. *Ley de enjuiciamiento civil*, § 259.

118. *Manresa, Comentario á la ley de enjuiciamiento civil*, II, 101 and note.

## WHERE THE JOURNAL IS ON SALE

The American Bar Association Journal is on sale at the following places:

- New York, Brentano's, 1 W. 47th St.
- Chicago—Brentano's, 218 So. Wabash Ave.; Post Office News Co., 31 West Monroe St.
- Denver, Colo.—Herrick Book & Stationery Co., 934 Fifteenth St.
- Los Angeles, Calif.—The Jones Book Store, 426-428 W. 6th St.
- Dallas, Texas—Morgan C. Jones, 101 N. Akard St.
- San Francisco, Calif.—Downtown Office of The Recorder, 77 Sutter St.
- Detroit, Mich.—John V. Sheehan & Co., 1550 Woodward Ave.
- Baltimore, Md.—The Norman, Remington Co., Charles St., at Mulberry.
- Boston, Mass.—The Old Corner Book Store, 80 Bromfield St.
- Cincinnati, Ohio—The W. H. Anderson Company, 524 Main St.

106. Gilbert, *Forum Romanum* (Tyler's ed.), c. IV, p. 44.

108. "Desuper implorando nobile officium iudicis, ut supplens, si quid melius peti aut potiusset, aut debuisset." Wetzell, *System des ordentlichen Civilprozesses* (3d ed.), § 81, note.

107. Richter in Weiske's *Rechtslexikon*, VI, 163; Eschriche, *Dictionario de legislación y jurisprudencia* (1874), II, 650, s. v. *Demanda*.

109. Code de procédure civile, § 480.

110. Codice di procedura civile, § 517.

111. Dalloz, *Répertoire*, Vol. XII (1850), p. 98. See also, *op. cit.*, Supplement, Vol. III (1888), pp. 574-576; Labori, *Répertoire*, Vol. III (1890), p. 650.

112. Mattiolo, *Trattato di diritto giudiziario civile* (5th ed.), II, 264 note. A decided stand is taken against this doctrine by Chiovenda, *Principi di diritto processuale civile* (3d ed.), 728-729.

113. Hellwig, *System des deutschen Zivilprozesses*, I, 412.

114. Menger, *System des österreichischen Civilprozessrechts*, 274.

115. Neumann, *Kommentar zu den Zivilprozessgesetzen vom 1. Aug. 1895*, 889; Pollak, *System des österreichischen Zivilprozessrechts*, I, 411.

116. Wrede, *Das Zivilprozessrecht Schwedens und Finnlands*, 43.

## PAYING OUR CLAIMS AGAINST GERMANY

Release of Alien Enemy Property and Payment of Our War Claims Against Germany Have Apparently Become Inseparably United and Constitute Perplexing Enigma—Mellon Plan is First Serious and Definite Measure Thus Far Suggested as Remedy

By JOSEPH CONRAD FEHR

*Of Counsel for U. S. Before American-German Claims Commission*

OF all the intricate matters now disturbing Congress the most delicate of all, perhaps, both from a national and international point of view, pertains to the settlement of the more than \$240,000,000 adjudicated war claims against Germany and the proposed release by the Alien Property Custodian, of what remains of the former enemy property seized during the war, now valued at approximately \$270,000,000.

Despite all efforts to dissociate the release of the alien property, as a distinctly separate issue from the various proposals to pay our war claims against Germany, there has since the war developed such a dovetailing between the two problems that they have become inseparable and together constitute a perplexing enigma.

The recently announced Mellon Plan which has been presented to Congress in a bill prepared by Representative Ogden L. Mills of New York is the first serious and definite measure thus far suggested as a remedy. The Mills Bill provides for the immediate return of the sequestered property and paves the way at the same time for the prompt payment of our claims against Germany directly out of the Treasury of the United States on the strength of Germany's reparation annuities payable to this country under the terms of the Dawes Plan as put into operation at the Paris Finance Conference last year.

It is now clear that if the United States had become a party to the Treaty of Versailles, the claims of American nationals who were despoiled during the war would probably have long since been paid out of the impounded enemy property in the hands of the Alien Property Custodian or else out of the share this country would undoubtedly have claimed in the \$2,000,000,000 or more which Germany paid to the Reparations Commission up to January 31, 1923, which amount was apparently made up, in the main of army costs and estimated deliveries in kind stipulated in the Treaty. Not one of the Allied countries has returned to former enemy nationals property seized from them during the war without first safeguarding the rights and privileges of their own nationals who sustained injuries and suffered losses on account of the war. These erstwhile Allies have in fact already liquidated practically all of their enemy property holdings pursuant to the clearing house provisions of the Versailles Treaty and many of the war claims of the respective governments and of their nationals are being satisfied out of the sequestered enemy property as well as from reparation payments.

In order to understand the difficulty Congress is encountering in arriving at a solution of this dual problem, it is instructive to note the steps that

were taken by the Allied Governments in working out a remedy. Great Britain, for instance, organized a special committee, with Lord Justice Younger as President, and authorized it to advise the Government in emergency cases relative to the release of property to former enemy owners. Such releases, however, were expressly limited to property up to the value of £1000 in favor of former enemy nationals resident in England. Releases in behalf of former enemy nationals who had previously resided in England, but who since the war removed elsewhere, were limited to the value of £200. It was probably this precedent which paved the way for the enactment by Congress on March 4, 1923, of the so-called Winslow Bill as an amendment to the Trading With the Enemy Act, directing the Alien Property Custodian to return to former enemy nationals any part of their property up to and including the value of \$10,000.

On February 12, 1925, Mr. Churchill, Chancellor of the Exchequer, stated in the House of Commons that Great Britain had received out of reparations payments £15,000,000, and had applied out of this sum £5,300,000, or approximately \$26,500,000 in satisfaction of the reparations claims of her subjects. This was over and above the British Army of Occupation costs, and in addition to the payment of the debt claims of British nationals out of the funds in the hands of the British Alien Property Custodian which passed through the Anglo-German clearing house.

During the first year of the operation of the Dawes Plan, Great Britain received altogether approximately M. 155,000,000. Indications are that French and Belgian nationals have fared even better in the distribution of reparations and the application of alien property funds in the settlement of their claims.

The European governments have, it is true, been able to expedite results by means of orders in council and other administrative measures within the discretion of the respective heads of governments, whereas the United States is powerless to meet the situation without an act of Congress.

Senator William E. Borah, of Idaho, Chairman of the Senate Committee on Foreign Relations, Senator William H. King of Utah, and others, have already strenuously protested against the actual confiscation of this property, as a matter of law and policy. They contend that when Congress passed the Trading With the Enemy Act, it was the intention of this country only to cripple German finances during the period of the war by seizing the enemy owned property and holding it in trust, thereby preventing its use to the mischief and

disadvantage of the United States and her Allies in the successful prosecution of the war.

There is no longer any reason why the questions of law and policy growing out of the seizure of enemy property in time of war should be confused. The Supreme Court of the United States has during the past six months announced three important decisions which should go far to clear up the misunderstandings which have obtained since that tribunal handed down its earliest opinions on the subject in *Ware v. Hylton* (3 Dallas, U. S. 1796, 1798); *Brown v. The United States* (8 Cranch, 110), and *Hanger v. Abbott* (6 Wall, U. S., 1867, 532). Last December the Supreme Court disposed of the so-called German Treasury Note cases. And although these cases involved the property rights and interests of the former German Empire and not strictly private property, the Court removed all doubt as to the right of Congress to confiscate this enemy property.

Mr. Justice Holmes, speaking for the entire court, said:

In these cases no judgment is asked against Germany or against property that it is entitled to defend. The funds were seized adversely by the United States in time of war. They are in its hands; it has declared by an act of Congress what shall be done with them, and that is the end of the matter. There is no question that such a seizure and disposition are within its powers. . . . The Treaty with Germany has recognized their effect.

If this expression of the Supreme Court left the question still in doubt it was unequivocally dispelled in the case of *L. Littlejohn and Company, Inc., et al., appellants, vs. The United States of America*, decided by the highest Court of the land on March 1, 1926, wherein Mr. Justice McReynolds, speaking for the entire court, stated:

It is unnecessary to consider how far the ancient rules of international law concerning confiscation of enemy property have been modified by recent practices. In the absence of convention every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs. The Hague Conference (1907) recognized this and sought by agreement to modify the rule. *The Blonde, supra* p. 326. Our problem is to determine the result of action taken under a Joint Resolution of Congress whose language is very plain and refers only to enemy vessels. It authorized the President to take "possession and title," and, obeying, he took them. We do not doubt the right of any independent nation so to do without violating any uniform or commonly accepted rule of international law; and Congress had power to authorize the action irrespective of any general views theretofore advanced in behalf of this government. Certainly all courts within the United States must recognize the legality of the seizure; the duly expressed will of Congress when proceeding within its powers is the supreme law of the land.

As regards the growing policy of civilized nations with reference to this problem Mr. Justice Sutherland speaking for the Supreme Court in the matter of *Richard Mayer v. Howard Sutherland, Alien Property Custodian, et al., etc., etc.*, decided May 24, 1926, exhibited the court's general attitude in the following stimulating observations:

War between nations is war between their individual citizens. All intercourse inconsistent with a condition of hostility is interdicted, *The Rapid*, 8 Cranch 155, 162-163, for fear that it may give aid or comfort to, or add to the resources of, the enemy. Moreover, as said by this court in *United States v. Lane*, 8 Wall. 185, 195, "If commercial intercourse were allowable, it would oftentimes be used as a color for intercourse of an entirely different character; and in such a case the mischievous consequences that would ensue can be readily foreseen." But war is abnormal and exceptional; and, while the supreme necessities which it imposes require that, in many respects, the

rules which govern the relations of the respective citizens of the belligerent powers in time of peace must be modified or entirely put aside, there is no tendency in our day at least to extend them to results clearly beyond the need and the duration of the need. The purpose of the restriction is not arbitrarily and unnecessarily to tie the hands of the individuals concerned, but to preclude the possibility of aid or comfort, direct or indirect, to the opposing forces. It is that purpose which gives birth to the rule and indicates its limits. The rule is simply "a belligerent's weapon of self-protection." *Daimler Co. v. Continental Tyre, etc., Co.*, (1916) 2 A. C. 307, 344. And it applies even where the trading is with a loyal citizen, if he be resident in the enemy's country, since the result of his action may be to furnish resources to the enemy. *Id.*, 319; *Janon v. Driefontein Consolidated Mines*, (1902) A. C. 484, 505. The whole tendency of modern law and practice is to soften the "ancient severities of war," and to recognize, increasingly, that the normal interrelations of the citizens of the respective belligerents are not to be interfered with when such interference is unnecessary to the successful prosecution of the war. Private rights and duties are affected by war only so far as they are incompatible with the rights of war. See, generally, *Kershaw v. Kelsey*, 100 Mass. 561, 568-574, where the question is elaborately reviewed in an opinion by Mr. Justice Gray which has several times received the approval of this court; *Briggs v. United States, supra*, p. 353; *Williams v. Paine*, 169 U. S. 53, 72; *Birge-Forbes Co. v. Heye*, 251 U. S. 317, 323.

However, Senator Claude A. Swanson and Senator Oscar W. Underwood have already indicated that they stand for the outright confiscation of this property, if need be, to ensure German retribution to all American nationals who have been despoiled on account of the war. They point out that although the United States elected to make a separate treaty of peace with Germany and did not become a party to the clearing house arrangement instituted under the Versailles Treaty, to which this country had an option, the United States nevertheless reserved the rights and privileges previously accorded to the Allies.

It was consequently not a mere gesture but a serious undertaking when the United States and Germany, pursuant to the Treaty of Berlin of August 25, 1921, incorporating as it does the Knox-Porter Peace Resolution of July 2, 1921, and the main provisions of the Treaty of Versailles, entered into the executive agreement of August 10, 1922, for the purpose of submitting all claims of the United States and American nationals against Germany for adjudication by a Mixed Claims Commission, specifically created by the terms of the agreement. The character of claims to be so disposed of was set forth in the agreement as follows:

(1) Claims of American citizens arising since July 31, 1914, in respect of damage to, or seizure of, their property, right, and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

Both the United States and Germany at once organized the Commission. Upon the suggestion of Germany that an American be named as Umpire and presiding officer of this Tribunal, the late William R. Day, then Associate Justice of the Supreme Court of the United States was so designated. Judge Edwin B. Parker, of Texas and New York, a distinguished lawyer who during the war served as priorities commissioner on the War Industries

Board and later as Chairman of the United States Liquidation Commission in Europe, which adjusted approximately \$1,800,000,000 in claims, accepted the appointment as American Commissioner. Germany appointed Dr. Wilhelm Kiesselbach, of Hamburg, an eminent continental authority on international law, as her representative on the Commission. Upon the resignation of Justice Day, who soon after died, Judge Parker was the choice of both the United States and Germany for the position of final arbiter. Judge Parker was succeeded as American Commissioner by Mr. Chandler P. Anderson, of New York and Washington, a recognized specialist in international law who has frequently represented the United States in the deliberations of international arbitrations here and abroad.

In less than four years this Tribunal and the Agents representing the respective governments together with their staffs of counsel have disposed of nearly all of the more than 12,000 claims. Germany was officially notified of these claims on April 9, 1923, as required under the rules adopted. And in terms of dollars and cents the exaggerated or unfounded as well as meritorious demands of the respective claimants reached the figure of \$1,479,064,313.92. This figure, however, included the cost of maintaining the American Army of Occupation along the Rhine, estimated at \$255,554,810.53, which, by reason of the agreement adopted by the Paris conference in January, 1925, is to be paid out of reparations through the operation of the Dawes Plan. The reparation demands of the principal Allied and Associated Powers, it will be recalled, totalled \$40,000,000,000.

Mr. Robert W. Bonyne, of New York, a prominent lawyer and former representative in Congress from Colorado, has been the American Agent in charge of the proper presentation of these claims before the Commission, assisted by his legal staff with Mr. H. H. Martin of Washington, who has ably served the United States Government in various advisory capacities, as chief counsel.

The German Agent is Dr. Karl von Lewinski, a high official in Germany's diplomatic service, who is also assisted by a staff of attorneys and advisors. Dr. Melchior von der Decken is the assistant German Agent.

There are still something more than 1,000 claims pending actual settlement but it can be estimated fairly accurately that the total bill against Germany when the work of adjudication is completed this year, will be between \$240,000,000 and \$250,000,000 including interest at the rate of five per cent. This means that the principal alone will amount to nearly \$180,000,000.

Of the private claims the figures now definitely ascertained are \$2,409,431.31 in awards on the nearly 200 claims arising out of the sinking of the Steamship *Lusitania* on May 7, 1915, and \$35,342,105.62 representing the total awards in the Marine Insurance Underwriter claims. It is estimated that the total awards in the strictly private claims, including property losses in Germany, debts, bank deposits, bonds, American interests in German estates, American hull and cargo losses, property losses in occupied territory, and claims on account of deaths and personal injuries due to Germany's submarine warfare (other than the *Lusitania* disaster), will amount approximately to \$135,000,000.

The claims put forward by the Government in

the nature of reparation demands, have already been awarded in the total amount of \$42,034,794.41, as follows:

By the United States Shipping Board.....	\$16,500,000.00
By the United States Veterans' Bureau .....	24,319,095.41
By the United States Railroad Administration...	1,215,000.00
By the United States Government Despatch Agency .....	699.00

The grand total of the principal thus arrived at will therefore be nearly \$180,000,000 and, adding interest due at the rate of 5% from various dates, America's total bill against Germany on account of both private and Government claims will amount close to \$250,000,000.

Eliminating the war risk insurance premium claims aggregating in amount claimed \$345,000,000, which were categorically dismissed by the Empire, and the Army of Occupation costs estimated at \$255,554,810.53, as well as about \$100,000,000, in duplications, the final awards of the Commission will, as stated, be about \$180,000,000, exclusive of interest, or less than 30% of the amount originally demanded.

The return of the sequestered enemy property in the light of these adjudicated and unpaid claims against Germany, presents, therefore, a problem fraught with difficulties and obstacles. The property sought to be returned was seized under the Trading With the Enemy Act of October 6, 1917, and then specifically set aside under the Knox-Porter Peace Resolution of July 2, 1921, which is by incorporation a part of the Treaty of Berlin, as a sort of pledge or security to ensure the payment by Germany of America's war claims once they were finally determined. This resolution provided:

All property of the Imperial German Government . . . and of German nationals, which was on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America . . . shall be retained by the United States of America and no disposition thereof made . . . until such time as the Imperial German Government . . . shall have . . . made suitable provision for the satisfaction of all claims . . . of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered . . . loss, damage, or injury to their persons or property . . .

Last summer the German Government filed with the Department of State an official request for the return of the property seized from German nationals during the war pursuant to the Trading With the Enemy Act of October 6, 1917. The cash assets and other enemy property thus subjected to sequestration was estimated at \$545,228,160.84.

By reason of the enactment of various amendments to that Act during and after the war, there was returned to former owners assets valued at \$235,370,096.92. This left remaining in the hands of the Alien Property Custodian as of January 1, 1924, cash assets and other property amounting to \$309,858,063.92. These figures do not include the German ships seized under the Resolution of May 12, 1917. The valuation of these ships as disclosed by the Reports of the Alien Property Custodian, is \$34,000,000. Congressman Newton, in a recent speech in the House of Representatives, says that the value thereof as found by the Navy Board was \$63,000,000. The same ships were valued by their former owners in the suits filed in the Court of Claims in excess of \$350,000,000. The Mellon Plan contemplates a valuation of the ships, the German patents, etc., not in excess of \$100,000,000.

During the year 1925, the Custodian was authorized to make the usual returns provided for by the so-called Winslow Bill, thereby reducing his holdings to \$270,000,000, more than enough to pay the American Claims against Germany should the United States and Germany agree to such a plan.

Many general theories have from time to time been advanced in favor of either the continued retention or the actual taking of the property still in the hands of the Alien Property Custodian as a set-off against the American claims. Indeed, outright confiscation has repeatedly been advocated, without reference to set-offs. The Mills Bill, however, supported by Mr. Mellon, Secretary of the Treasury, discards all these suggestions and recommendations, and avoids a confiscatory policy by providing for the immediate release by the Alien Property Custodian of all property seized during the war from enemy nationals, or its equivalent and stipulates that American claimants holding awards against Germany be paid out of unappropriated funds in the United States Treasury or if additional funds are necessary, by the issuance of bonds in accordance with the Liberty Bond Acts and the Victory Liberty Loan Act, as amended and supplemented.

This plan is put forward on the theory that the United States assume only temporarily the obligation of Germany and promptly pay the 12,000 claims or more filed with the Mixed Claims Commission, against Germany, on the security afforded by the annuities payable to this country under the Dawes plan as finally put into operation at the Paris Finance Conference last year. These annuities contemplate the payment of our Army of Occupation costs and perhaps our strictly Government claims at the rate of \$12,000,000 per annum. The private claims are eventually to be reimbursed by the Dawes annuities at the rate of \$11,000,000 a year which figure represents in American currency the "2¼% of all receipts from Germany on account of the Dawes annuities available for distribution as reparations, provided that the annuity resulting from this percentage shall not exceed the sum of forty-five million gold marks."

The plan further provides for the appointment by the President of an Arbiter who is to render an award of compensation to German nationals for the title to and/or use of ships, wireless stations and other property including patents, that were seized and used by the United States.

In this wise, it is contemplated that all the claims against Germany upon which the Mixed Claims Commission, United States and Germany, has entered awards will be paid outright by the United States on the strength of the security afforded by payments annually due the United States out of reparations under the Dawes plan.

Apparently, Germany asks the United States to return the sequestered property of her nationals at this time on the theory that all her assets and resources are mortgaged to the Allies in accordance with the stipulations entered into at the Paris Finance Conference last spring in which this Government participated with the former Principal Allied and Associated Powers in putting the Dawes Plan into final operation and adopting a definite workable reparations program.

The result arrived at in Paris and its effect upon the liquidation of American claims against

Germany is clearly set forth in the letter addressed to President Coolidge on February 3, 1925, by the then Secretary of State, Charles Evans Hughes, as follows:

It is evident that it was the intention of the (Dawes) Committee to provide a comprehensive plan of economic reconstruction and that the annual payments to be made by Germany were to be applicable to all her obligations to the "Allied and Associated Powers," this descriptive term manifestly including the United States.

In view of the inclusive nature of the payments contemplated by the Dawes Plan, the American Ambassador at London was directed to attend the conference (London) in order that the interests of the United States might be appropriately safeguarded. . . . It was arranged that a meeting (Paris) of Finance Ministers of the Allied Powers should be convened for the purpose of allocating these payments. . . . It was important that the payments expected under the Dawes Plan should not be distributed without appropriate recognition of the claims of the United States and its participation in these payments

In other words, by Article III of the Paris Agreement, it is provided:

(A) Out of the amount received from Germany on account of the Dawes annuities, there shall be paid to the United States of America the following sums in reimbursements of the costs of the United States Army of Occupation and for the purpose of satisfying the awards of the Mixed Claims Commission established in pursuance of the Agreement between the United States and Germany of August 10th, 1922.

1. Fifty-five million gold marks per annum, beginning September 1st, 1926, and continuing until the principal sums outstanding on account of the costs of the United States Army of Occupation, as already reported to the Reparation Commission, shall be extinguished. . . . Arrears shall be cumulative and shall bear simple interest at 2½ per cent.

2. Two and one-quarter per cent (2¼ per cent) of all receipts from Germany on account of the Dawes annuities available for distribution as reparations, after deduction of the sum allotted for other Treaty charges by this agreement.

3. Provided that the annuity resulting from this percentage shall not in any year exceed the sum of forty-five million gold marks. . . .

Pursuant to this agreement, the first distribution contemplated was made September 1, 1925, and there was allocated to the United States under the 2¼ per cent provision 15,213,000 gold marks, or approximately \$3,750,000. It is important to note that the amounts payable on account of America's Army of Occupation costs are cumulative, whereas the 2¼ per cent payable on behalf of American private claims is not cumulative and that the total is not to exceed in any one year 45,000,000 gold marks, or \$11,000,000.

The maximum, therefore, which the United States can receive under the Paris Agreement is \$11,000,000 a year, in addition to the provision for army of occupation costs.

The Dawes Plan as thus put into operation for the benefit of the United States at the Paris Conference is probably entirely proper as regards this Government's claim for the cost of the Army of Occupation along the Rhine. But from the standpoint of American citizens holding awards from the Mixed Claims Commission, United States and Germany, the projected payment of their claims on the basis of the 2¼% arrangement at the rate of \$11,000,000 is obviously altogether unsatisfactory. The Lusitania claimants alone have waited now eleven years for financial satisfaction.

If individual American claimants were to rely exclusively on the annuities payable under the Dawes Plan as calculated by the Paris Agreement

they would be required to wait more than half a century before final payment could be effected. This would, obviously, be an injustice. Hence, unless some other concrete plan is evoked that can circumvent the possibility of the Government of the United States "holding the bag" for two or more generations, it would seem that Mr. Mellon's carefully prepared plan merits serious consideration.

The House of Representatives has been holding hearings on the so-called Mills Bill this spring with a

view to clarifying the issues, and Senator Borah, Chairman of the Senate Committee on Foreign Relations, has introduced a measure in the Senate essentially along the same lines. The stage is therefore set for action by the next Congress, but in view of the varied differences of opinion in official as well as unofficial quarters respecting the merits of Mr. Mellon's plan, there is little likelihood of its passage in the original form.

## FINAL ARRANGEMENTS FOR DENVER MEETING

(Continued from Page 383)

sions on Tuesday, July 13, in the Capital Life Auditorium at 2 P. M. and 8 P. M. The following speakers will address the Section:

Oscar Hallam of the St. Paul Bar, Chairman of the Section of Criminal Law, "Movements for Better Law Enforcement to Date."

Charles A. Boston of the New York Bar, "Crime Waves and Their Suppression—Past History," "Informal Presentation of Advantages Which May Be Gained from a Study of the History of Crime Suppression."

Charles C. Butler, President of the Denver Bar Association, "The Administration of Criminal Justice."

Arthur V. Lashly of St. Louis, Operating Director of the Missouri Association for Criminal Justice, "The Missouri Crime Survey."

William Draper Lewis of Philadelphia, Director of the American Law Institute, "Model Code of Criminal Procedure."

### Section of Patent, Trade-Mark and Copyright Law Tuesday, July 13

10:00 A. M. Annual Meeting of the Patent Section, Drawing Room, Brown-Palace Hotel.

1:00 P. M. Luncheon.

2:00 P. M. Program to be announced later.

7:00 P. M. Dinner, Palm Room, Brown-Palace Hotel.

#### Comparative Law Bureau

1 P. M., Tuesday, July 13, Brown-Palace Hotel.

#### Section of Legal Education and Admission to the Bar

2 P. M., Tuesday, July 13, Ball Room, Shirley Savoy Hotel.

#### Tentative Program, Section of Public Utility Law

The Ninth Annual Meeting of the Section will be held on Monday, July 12, and Tuesday, July 13, 1926.

There will be three sessions of the Section: 2:30 P. M. Monday, July 12, and 10:00 A. M. in Rainbow Lane, Shirley Savoy Hotel. Dinner at 7:00 P. M., Tuesday, July 13, at Denver Club.

Speakers and Program to be announced later.

#### Commissioners on Uniform State Laws

##### Thirty-Sixth Annual Conference

Ball Room—Brown-Palace Hotel, Denver, Colorado

Tuesday, July 6

9:30 A. M. First Session:

Address of Welcome.

Response of President.

Roll Call.

Reading of Minutes of Last Meeting.

Address of President.

Report of the Secretary.

Report of the Treasurer.

Report of the Executive Committee.

Appointment of Committee on Memorials.

Report of Standing Committees:

Scope and Program.

Educational and Publicity.

Legislative.

Appointment of and attendance by Commissioners.

Reports of General Committees:

Legislative Drafting.

Uniformity of Judicial Decisions.

Cooperation with Other Organizations Interested in Uniform State Laws.

Cooperation with American Institute.

The following acts will be considered in order, according to the arrangement tentatively made:

Uniform Federal Tax Lien Registration Act.

Uniform Chattel Mortgage Act.

Uniform Public Utilities Act.

Uniform Act for Extradition of Persons Charged with Crime.

Uniform Act to Regulate the Sale of Firearms.

Uniform Trust Receipts Act.

Uniform Mechanic's Lien Act.

Uniform Act for the Compulsory Attendance of Non-Resident Witnesses.

Uniform Drug Act.

Uniform Inheritance Tax Act.

Uniform Child Labor Act.

The four Uniform Vehicle Codes will be made a special order for Friday, July 9.

It is planned to hold a dinner for the Commissioners and their guests at the Brown Palace Hotel, Tuesday evening, July 6.

Special tourist railroad rates are available to the Commissioners.

GEORGE G. BOGERT, Secretary,  
University of Chicago Law School.

#### Entertainment Program for the Commissioners on Uniform State Laws

On Tuesday, July 6th, 4 to 6 P. M., there will be a Garden Party for the members of the Con-

ference and the ladies in their party, at the residence of Judge Platt Rogers, 15th and Washington Streets. Transportation from the Brown-Palace Hotel will be provided.

On Friday, July 9th, at 1 P. M., there will be a Luncheon, followed by a Garden Party with Bridge, for the ladies of the Commissioners' party at the home of Mrs. W. W. Grant, Jr., at Montclair.

On Sunday, July 11th, there will be an all day motor trip for the Commissioners and the ladies accompanying them, into the Mountain Park District.

#### Judicial Section

##### Afternoon Session, 2 o'clock, Tuesday, July 13

*Supreme Court, Capitol Building*

Address of welcome, Hon. George W. Allen, Chief Justice, Supreme Court of Colorado.

Response, Hon. Robert R. Prentis, Judge Supreme Court of Virginia.

Address, Dean Roscoe Pound, Harvard Law School. (Subject to be announced later.)

Address, Hon. John S. Dawson, Justice Supreme Court of Kansas, "Rationale of Appellate Procedure."

Address, Hon. Haslett P. Burke, Judge Supreme Court of Colorado. (Subject to be announced later.)

The Annual Dinner of the Judicial Section will be held in the Palm Room, Brown-Palace Hotel, Wednesday, July 14th, at 7 o'clock p. m. Speakers and subjects will be announced later.

##### Section of Patent, Trade-Mark and Copyright Law Tuesday, July 13th

Business sessions at 10 a. m. and 2:30 p. m., Drawing Room, Brown-Palace Hotel. The Chairman will report progress made during the year, followed by reports of the committees on

Legislation: A. C. Paul, Chairman, concerning bills pending in Congress.

Copyright Legislation: E. S. Rogers, Chairman, concerning General Copyright Bill H. R. 10434 and international copyright.

Design Copyright: L. D. Underwood, Chairman, concerning H. R. 6249.

Patent Law Revision: C. H. Howson, Chairman, concerning proposed further amendments of the patent statutes with the recommended bill submitted for discussion.

Luncheon for members of the section at 1 p. m. (Place to be announced.)

Dinner for members, ladies and guests, 7 p. m., Palm Room, Brown-Palace Hotel.

#### National Association of Attorneys General

*Cosmopolitan Hotel, Denver, Colorado*

##### Monday and Tuesday, July 12 and 13, 1926, 10 A. M. and 2:30 P. M.

Address of Welcome: Hon. C. J. Morley, Governor of Colorado.

Address of President: Hon. George M. Napier, Attorney General of Georgia.

Address: Hon. Herman L. Ekern, Attorney General of Wisconsin, "Inheritance Taxes".

Address: Hon. Harvey H. Cluff, Attorney General of Utah, "Fair and Unfair Competition".

Address: Hon. O. S. Spillman, Attorney General of Nebraska, "The Gasoline Situation".

Address: Hon. Ben J. Gibson, Attorney General of Iowa, "A State Bureau of Investigation".

Address: Hon. North T. Gentry, of Missouri, "Cooperation between Federal and State Officials".

Address: "Pardon and Parole Systems" (Speaker to be announced later.)

Election of Officers.

#### International Association of Attorneys General *Cosmopolitan Hotel, Denver, Colorado*

Tuesday, July 13, 1926, 10:00 A. M.

##### Tentative Program

Address of Welcome: Hon. William L. Boatright, Attorney General of Colorado.

Address of President: Hon. Clifford L. Hilton, Attorney General of Minnesota.

Address: Hon. Jay R. Benton, Attorney General of Massachusetts, "International Extradition".

Address: "Law Enforcement and Criminal Procedure", followed by round table discussion,—Hon. Oscar E. Carlstrom, Attorney General of Illinois and an Attorney General of a Canadian Province.

Election of Officers.

##### Luncheons

Bar Association Secretaries: University Club, Tuesday, July 13th, 1 P. M.

Chicago University Law School Alumni: Brown-Palace Hotel, (Room 2) Thursday, July 15th, 1 P. M.

Harvard Law School Alumni: Brown-Palace Hotel, (Palm Room) Thursday, July 15th, 1 P. M.

Yale Law School Alumni: Brown-Palace Hotel, (Drawing Room) Thursday, July 15th, 1 P. M.

University of Michigan Law School Alumni: Brown-Palace Hotel—Thursday, July 15th, 1 P. M.

University of Colorado Law School Alumni: Shirley-Savoy Hotel, Thursday, July 15th, 1 P. M.

##### Dinners

Delta Theta Phi: Cosmopolitan Hotel, Wednesday, July 14th, 7 P. M.

#### Special Announcements

##### Annual Dinner

The annual dinner of the Association will be given at the Denver Auditorium, Denver, on Friday night, July 16th, at 7:00 o'clock. The ladies accompanying members are invited to attend this dinner as the guests of the Colorado and Denver Bar Associations.

Hon. Chester I. Long, President of the Association, will preside.

A charge of five dollars for dinner tickets will be made to members and delegates. A limited number of tickets for guests (non-members of the Association) will be furnished to members, space permitting, at a charge of seven dollars each.

Tickets for the annual dinner can be procured and arrangements made for table parties on application at the office of the Treasurer, at the headquarters of the Association in the Cosmopolitan Hotel, where representatives of the Dinner Committee will be in attendance from 9:00 A. M. to 6:00 P. M. on Monday, Tuesday and Wednesday,

July 12th-14th, and on Thursday, July 15th, until noon (the day before the annual dinner.)

Arrangements for table parties cannot be made after one o'clock Thursday afternoon, July 15th.

Printed seating lists, alphabetically arranged, of members in attendance at the dinner will be provided, showing the number of the table assigned to each person, and therefore the closing on Thursday noon of the subscription books for the dinner on Friday night is necessary in order to permit the preparation and printing of these seating lists.

### Special Trains to Denver

Arrangements have been made with the Chicago, Burlington & Quincy Railroad Company to run three special trains for the American Bar Association from Chicago to Denver on the following schedules:

Leave Chicago ... 6:00 P. M. Sunday, July 11  
Arrive Denver ... 7:30 P. M. Monday, July 12

Leave Chicago ... 11:30 P. M. Sunday, July 11  
Arrive Denver ... 7:15 A. M. Tuesday, July 13

Leave Chicago ... 5:30 P. M. Monday, July 12  
Arrive Denver ... 7:55 P. M. Tuesday, July 13

Each of these trains will be equipped with the latest type club-observation cars, Pullman sleeping cars, and dining cars, and special menus will be prepared and served.

The special trains will leave from the new Union Station, Chicago, which is also the terminal of the Pennsylvania Lines, Chicago & Alton Railroad and Chicago, Milwaukee & St. Paul Railroad.

Special facilities will be provided in the station where members may meet, leave their baggage, secure information, and avail themselves of the most modern accommodations afforded to travelers during the interim between trains.

Railroad tickets should be purchased at point of departure and routed from Chicago to Denver over the Chicago, Burlington & Quincy Railroad. Provision will be made for special trains returning from Denver in the event there is sufficient demand for this service. Those contemplating traveling West from Denver can secure their return ticket over any route that suits their convenience. Those planning to return to Chicago directly after the meeting should purchase their return tickets over the Chicago, Burlington & Quincy, and in making reservations should also request Pullman accommodations for the return trip. Purchasers of tickets to Denver are advised to get Colorado Springs' coupons attached. No extra charge for this.

In order to assure adequate accommodations, members desiring to use these trains should write at once for their reservations, specifying kind desired (upper berth, lower berth, compartment or drawing room), and should address their request to J. R. Van Dyke, General Agent, Chicago, Burlington & Quincy R. R. Co., 179 West Jackson Boulevard, Chicago, Ill.

### Connections at Chicago

The Broadway Limited, via Pennsylvania Lines, leaving New York at 2:55 P. M., Harrisburg 6:47 P. M., Pittsburgh 12:28 midnight, arrives Chicago at 9:55 A. M.

The Liberty Limited, Pennsylvania Lines, leaving Washington at 3:30 P. M., arrives Chicago 9:30 A. M.

Columbus, Logansport and intermediate points can enjoy day service on Pennsylvania train No. 33 leaving Columbus at 8:50 A. M., passing Logansport 1:50 P. M., arriving Chicago 5:00 P. M.

Along the main line of the Pennsylvania R. R. from Pittsburgh, Pennsylvania train No. 107 leaving Pittsburgh 4:52 A. M., carrying parlor cars and general high class equipment, making Canton, Massillon, Mansfield, Fort Wayne, arrives Chicago 4:55 P. M.

The Pennsylvania also has a good train from Cincinnati to Chicago, leaving Cincinnati at 8:50 A. M., making Richmond, Logansport and way stations, arriving Chicago 5:15 A. M. This train also has a connection from Indianapolis, leaving there at 11:45 A. M. and arriving Chicago at 5:15 P. M. This train also handles through cars from Louisville that leaves Louisville at 8:30 A. M.

The B. & O. Capitol Limited, leaving Baltimore 1:52 P. M., and Washington at 3:00 P. M., Pittsburgh 10:00 P. M., arrives Chicago at the Grand Central Station at 9:00 A. M.

The New York Central Twentieth Century Limited leaving New York at 2:45 P. M., Albany at 5:49 P. M., Utica at 7:43 P. M., Syracuse 8:53 P. M., Rochester 10:25 P. M., arrives Chicago, La Salle Street Station at 9:45 A. M.

The Twentieth Century connection from Boston leaves at 12:30 P. M.

The New York Central Lake Shore Limited leaving New York 5:30 P. M., Albany 9:00 P. M., Syracuse 11:08 P. M., Rochester 12:25 A. M., arrives Chicago at 4:00 P. M.

The Lake Shore Limited leaves Cleveland 8:20 A. M., Sandusky 9:55 A. M. and Toledo 11:05 A. M.

The Wolverine on the Michigan Central, leaves Detroit at 7:25 A. M., Ann Arbor 8:10 A. M., Jackson 9:57 A. M., Kalamazoo 10:41 A. M., Niles 11:34 A. M. and arrives Chicago 2:00 P. M.

The Michigan Central Chicago Special leaves Detroit at 8:00 A. M., Ann Arbor 8:49 A. M., Jackson 9:45 A. M., Albion 10:12 A. M., Battle Creek 10:43 A. M., Kalamazoo 11:19 A. M., Niles 12:21 P. M., Michigan City 1:11 P. M., arriving Chicago 2:50 P. M.

The Michigan Central Motor City Special leaves Detroit at 11:30 P. M., arrives Chicago 7:20 A. M.

### Connections En Route

Leave Minneapolis, C. & N. W. .... 7:35 P. M.  
Leave St. Paul, C. & N. W. .... 8:15 P. M.  
Arrive Omaha, C. & N. W. .... 7:40 A. M. next day  
Leave Omaha, C. B. & Q. .... 7:55 A. M.  
Arrive Denver, C. B. & Q. .... 7:55 P. M.  
Leave St. Louis, C. B. & Q. .... 11:55 P. M.  
Arrive Lincoln, C. B. & Q. .... 5:45 P. M. next day  
Leave Lincoln, C. B. & Q. .... 6:00 P. M.  
Arrive Denver, C. B. & Q. .... 7:15 A. M. next day

OR—

Leave St. Louis, C. B. & Q. .... 2:15 P. M.  
Arrive Omaha, C. B. & Q. .... 7:10 A. M. next day  
Leave Omaha, C. B. & Q. .... 7:55 A. M.  
Arrive Denver, C. B. & Q. .... 7:55 P. M.  
Leave Kansas City, C. B. & Q. .... 10:30 A. M.  
Arrive Lincoln, C. B. & Q. .... 5:45 P. M.  
Leave Lincoln, C. B. & Q. .... 6:00 P. M.  
Arrive Denver, C. B. & Q. .... 7:15 A. M. next day

### Headquarters

Cosmopolitan Hotel, 18th street and Broadway.  
Capacity: 430 rooms with bath.

Rates: Single rooms, \$5.00 and \$6.00 per day.  
Double rooms, \$8.00 to \$12.00 per day.

#### Reservations and Hotel Information

For reservations and further information concerning the Cosmopolitan and other Denver Hotels listed below, address:

Miss Mabelle A. Carter, 508 Equitable Building, Denver, Colorado.

Arrangements can also be made through Miss Carter for accommodations in family hotels and furnished apartments for members bringing their families or who will spend their vacation in Denver after the meeting is over.

#### Reduced Rates for Denver Meeting

Summer tourist rates to Denver and the National Parks will be available in the greater portion of the United States, and amount to approximately one fare and one-tenth for the round trip. The return limit allows ample time after the close of the meeting for a vacation trip.

For Colorado and the territory contiguous thereto, embracing Colorado, Idaho, Kansas, Montana, Nebraska, North Dakota, New Mexico, South Dakota, Utah, Wyoming, and parts of Nevada and Oregon, arrangements have been made with the Transcontinental Passenger Association for securing the usual reduction of 25%. Identification certificates have been distributed to members living in the states mentioned.

### The Post-Convention Trip to Yellowstone and Glacier Parks

A trip through Yellowstone and Glacier Parks has been arranged to follow the meeting in Denver, and quite a number of the members of the Association have made definite plans to go. Some members of the party will go only as far as Yellowstone, while others will go on to Glacier Park. To make the trip through both Parks will require about two weeks, and the approximate expense from Denver to Chicago will be \$190.00 per person, exclusive of return railroad fare. The trip to Yellowstone only requires about ten days from the time of departing from Denver until one reaches Chicago, and the cost per person from Denver will be approximately \$123.00.

The party will leave Denver Sunday night, July 18th, and going by Colorado Springs, Glenwood Springs, and Salt Lake City, with stop-overs for sight-seeing at all points, will reach Yellowstone on July 22nd, where five days will be spent.

The members of the party going on to Glacier will leave Cody, Wyoming, on July 26th, reaching Glacier Park the next day, where a tour of four days through the Park will be taken.

There is still time to make arrangements for joining this party if application for information, rates, etc., is promptly made to Mr. J. R. Van Dyke, General Passenger Agent, Chicago, Burlington & Quincy Railroad Company, 179 West Jackson boulevard, Chicago, Ill.

### Location and Rates of Denver Hotels

Hotel	Location	Single with bath	Double with bath	Single without bath	Double without bath
Adams	18th and Welton	\$5.00	\$6.00	.....	.....
Albany	17th and Stout	5.00	6.00-10.00	\$4.00	\$5.00-6.00
Argonaut	Colfax and Grant	5.00	6.00	.....	.....
Auditorium	14th and Stout	3.50	6.00	3.00	4.00
Brown Palace	17th and Tremont	5.00	8.00	.....	.....
Cosmopolitan	18th and Broadway	5.00-6.00	8.00-10.00	.....	.....
Colorado	17th and Tremont	.....	5.00	.....	3.00
Crest	20th and Broadway	1.00	3.00	1.50	2.50
DeSoto	1848 Broadway	.....	4.50	1.50	2.50
Hall	1315 Curtis	3.00	5.00	2.00	3.00
Kenmark	17th and Welton	3.00	5.00	2.50	3.50
Lancaster	18th and Sherman	5.00	6.00	3.00	4.00
Mayflower	17th and Grant	3.50	6.00	.....	.....
New House	Colfax and Grant	5.00	7.50	.....	3.00
Sears	18th and California	3.00-5.00	5.00-8.00	.....	.....
Shirley-Savoy	17th and Broadway	5.00	6.00-8.00	3.00	4.00-6.00
Standish	1530 California	3.00-6.00	5.00-9.00	2.50-5.00	3.50-7.00
St. Francis	14th and Tremont	.....	6.00	.....	4.00
Wellington	1450 Grant	*6.50	*10.00	*5.00	*8.50
West Court	14th and Glenarm	3.50	6.00	2.50	4.00

#### Available Hotels Not Shown on Map

Colburn	10th and Grant	5.00	7.00	.....	.....
Oxford	17th and Wazee	4.00	6.00	2.50	4.00
West	1337 California	2.50	5.00	1.50	3.00

\*American Plan.

# SESQUICENTENNIAL OF AMERICAN INDEPENDENCE

BY WADE MILLIS

*President Michigan State Bar Association*

FIFTEEN decades have given us the perspective to view the romance and the human interest as well as the political effect and historic importance of the Declaration of Independence.

In this article I would dwell more especially upon our forbears who adopted the Declaration, as men who in times of suffering were patient and enduring, who in the face of dangers were brave, who ventured confidently into the unknown where others had feared to tread, who labored and fought for a vague and ideal something in government for which history afforded no precedent, but for the accomplishment of which the articles of faith which they ultimately adopted and announced with such dignity and high purpose, gave them confident assurance.

As every revolution is said to have been in the first instance merely a thought in someone's mind, so the American Revolution which was commenced by the battle of Lexington in April, 1775, more than a year before the causes and purposes of the war were given voice by the Declaration, was simply the result of a firm determination in the minds of many of the Colonists not to be bullied by King George III., an obstinate monarch whose nativity, temperament and training were such as to make him unsympathetic with and even intolerant of the people over whom he ruled.

Our sympathies and our patriotic emotions are stirred by reflections upon the great moment of history that occurred July 4, 1776, when the Continental Congress, sitting in Independence Hall in Philadelphia, gave to the world by the hand of its author, Thomas Jefferson, the immortal Declaration in which the ideal of American liberty and the finest conception and the loftiest purpose of human government are found.

We sometimes are led to believe that it was a body of super-men who thus elevated their cause before the eyes of the world, and that it was inspiration or supreme wisdom that gave stimulus and popularity to the Declaration, to the support of which they declared, "We pledge our lives, our fortunes and our sacred honor." It does not detract from but rather it adds to the romantic features of our perspective view when calm judgment and a mature consideration of events in their logical sequence compel the admission that these ancestors of ours were much like men of our own day; that they were fearless, capable and keen-minded, but that their action was the natural result of a march of events that was not of their own initiative nor within their power to control.

The battles of Lexington, Concord, Bunker Hill, Fort Moultrie, Crown Point and Ticonderoga had already become history. Montgomery and Arnold had made their daring attempts upon Canada. Washington had been commissioned as Command-

er-in-Chief of the Colonial Army and had been in the exercise of that command since July, 1775. The British troops had been besieged and forced to evacuate Boston. Loans had been negotiated by the Colonies to prosecute the war. All these and other stirring and conspicuous events of the Revolution had occurred before the Continental Congress had declared, or perhaps even thought of declaring, a formal statement of the "cause of action," as lawyers would term it, which is what the Declaration of Independence really was.

The Congress had hesitated, debated, petitioned and resolved. As a deliberative body it had, with feeble efforts, in time of existing war, attempted the functions that a firm executive power only could perform successfully. It dallied in the mistaken thought that actual warfare against and loyalty to the mother country were not inconsistent and that each could simultaneously be maintained. It sought comfort in the hope that by force of arms, *concessions*, not independence, could be obtained from Great Britain and that such concessions would satisfy the Colonies and afford all necessary relief for their many grievances.

The idea of independence developed slowly. A majority of the Colonists were loyal and were loath to consider dissolving the ties that bound them to England, and they feared the result of an experiment in government which any new and untried political status of the colonies would surely bring. The perplexity and doubt which Congress manifested until July, 1776, was only a reflection of the sentiment of the people themselves. We can see now, however, that by the logic of events which followed closely after the battle of Lexington, independence was becoming more and more impelling and unavoidable, and that public sentiment finally developed to a point where it was even in advance of that prevailing among the delegates who composed the Continental Congress itself. The Colonies began one by one to set up plans for individual government and presently they were instructing their delegates in Congress to urge and support plans and measures that were intended to and did lead slowly but surely to the idea of a complete separation from England and the organization of a new nation.

On June 8, 1776, Richard Henry Lee, a delegate from Virginia, offered in Congress this resolution:

That these united colonies are and of right ought to be free and independent states; that they are absolved from all allegiance to the British crown and that all political connection between them and the state of Great Britain is and ought to be fully dissolved.

The resolution was seconded by John Adams of Massachusetts, the brilliant young lawyer who six years before had attracted widespread attention to himself and had bestowed honor upon his profession by voluntarily defending Captain Preston of the British Army and the six privates who were

\*Lieut. Colonel, Judge Advocate General, Reserves, Army of the United States; President, Michigan State Bar Association.

tried on a charge of murder for firing upon a mob in the streets of Boston. This resolution was the subject of earnest debate in Congress for two days. While it seemed manifest that it would have a favorable vote, an adjournment for three weeks was taken to permit the delegates to consult their constituents and to make sure if possible of unanimous action when the vote should be taken on this momentous question. A committee of five, Thomas Jefferson, Benjamin Franklin, John Adams, Roger Sherman and Robert Livingstone, was appointed to prepare a Declaration of Independence, and this committee selected Jefferson to draft it.

During the three weeks' adjournment, twelve of the Colonies signified their desire for affirmative action on the resolution, and the thirteenth, Pennsylvania, with some misgivings, while still refusing to vote affirmatively, agreed to sustain Congress if it should be adopted.

July 1st, 1776, Congress reassembled with fifty delegates present and with solemn dignity faced the gravest responsibility that it had ever undertaken. The regular order of business was taken up. A letter from Washington was read that was pathetic in its recital of his difficulties but which breathed the courage that he always displayed. Another letter was read describing the state of affairs at Charleston, now beleaguered by the British. Upon motion, Congress went into a Committee of the Whole to consider the resolution respecting independence. Thereupon, John Adams, who had suffered keenly over the manifest doubt and suspicion that many had entertained concerning him because of his professional service in defending the unpopular English soldiers in Boston in 1770, delivered a speech in favor of the resolution that is said to have been a compelling feat of patriotic eloquence. A test vote was taken. Nine colonies favored independence. Two voted in the negative. The other two declined to vote at all.

Upon motion, the final vote was postponed a day and the Committee of the Whole rose. July 2nd, 1776, a further urgent communication from Washington was read, reporting the arrival of a British fleet off New York. No definite news had arrived from Charleston, but it was feared that that

devoted city had fallen to the enemy. With danger pressing closer than ever before the spirit of bravery and fine courage was never more apparent. It was urged that if the just reasons for the actual war that had already been in progress for more than fifteen months were expressed by the solemn act of those delegates in Congress assembled, such action would crystallize the sentiment for independence that lately had been growing so rapidly and would justify in the eyes of mankind the continuance of the war to accomplish that end.

Meanwhile, a canvass showed that only two delegates from Delaware were present that day and that they held opposite views on the subject. The absent delegate, Caesar Rodney, who was known to favor independence, was in Dover, about eighty miles away. A courier was dispatched for him. The day wore on. Finally, Rodney in riding clothes dashed in. The vote was taken. Only two dissenting voices were heard on the great question. The resolution was adopted. A new nation had been born and the Colonies thereupon were transformed into the thirteen original States of the Union!

With some slight changes, the Declaration which Jefferson had written was then solemnly approved, as a justification for the adoption of Lee's resolution, which action by the Congress had established a new world nation. The Declaration was signed by the president of Congress and attested by its secretary. Two days later, July 4, 1776, it was published and was read to the American Army in the field at retreat. Still later in the summer the engrossed copy on parchment, the same one which may now be seen in the Congressional library in Washington, was prepared and signed by nearly all the delegates who had participated in its adoption.

Jefferson is said to have written the Declaration at a single sitting and without reference to any books or authorities. That document is not only a great piece of literature, but his thought, which it so clearly expresses, established a great fact in human history: Government is not the *source* of power, but merely the *agency* of the real source—the people themselves.

We are the beneficiaries of that conception.

## MEMBERSHIP IN AMERICAN BAR ASSOCIATION

### Qualifications

THE constitution declares membership in good standing at the bar of any state during the last three years (part of which may have been spent in one state and part in another) a prerequisite to election.

### Dues

The dues are \$6.00 per year. There is no initiation fee. Member receive, as perquisites of membership, the monthly "American Bar Association Journal" and the printed annual reports of the proceedings of the Association, constituting a valuable year book of the profession in this country, in which their names are listed as members, both in the alphabetical list and in the list of members arranged by cities and towns in states.

### Life Membership

Annual dues, at the option of any member, may be commuted by the payment of \$200.00 at one time; and thereafter no further dues shall be payable by any such member.

### Application Blanks

Blank applications for membership in the American Bar Association may be obtained by applying to any of the following:

### Membership Committee

Frederick E. Wadhams, Chairman; 78 Chapel street, Albany, N. Y.  
Simeon E. Baldwin, 11 Center street, New Haven, Conn.  
Moorfield Storey, 735 Exchange Bldg., Boston, Mass.  
Francis Rawle, Packard Bldg., Philadelphia, Pa.  
Henry St. George Tucker, Lexington, Va.

Jacob M. Dickinson, 231 So. La Salle St., Chicago, Ill.  
 Frederick W. Lehmann, 609 Merchants Laclede Bldg.,  
 St. Louis, Mo.  
 Frank B. Kellogg, 1512 Merchants National Bank Bldg.,  
 St. Paul, Minn.  
 Peter W. Meldrim, 1007 National Bank Bldg., Savannah,  
 Ga.  
 Elihu Root, 31 Nassau St., New York City.  
 George T. Page, 605 Federal Bldg., Chicago, Ill.  
 Hampton L. Carson, 931 Weightman Bldg., Philadelphia,  
 Pa.  
 John W. Davis, 15 Broad street, New York City.  
 R. E. L. Saner, 1412 Magnolia Bldg., Dallas, Texas.  
 Charles E. Hughes, 100 Broadway, New York City.

### District and State Directors

#### First District

Director .....George B. Young, 116 State St., Mont-  
 pelier, Vt.  
 Maine .....William T. Gardiner, Gardiner, Me.  
 Vermont .....Walter S. Fenton, Gryphon Bldg., Rut-  
 land, Vt.  
 Massachusetts ....John E. Hannigan, 206 Barristers Hall,  
 Boston, Mass.  
 New Hampshire....Louis E. Wyman, Merchants Bank Bldg.,  
 Manchester, N. H.  
 Connecticut .....Harrison Hewitt, 121 Church St., New  
 Haven, Conn.  
 Rhode Island.....G. Frederick Frost, P. O. Box 1201, Provid-  
 ence, R. I.

#### Second District

Director .....Frederick E. Wadhams, 78 Chapel St.,  
 Albany, N. Y.  
 New York .....Martin Conboy, 27 Pine St., New York,  
 N. Y.  
 Pennsylvania .....Jos. W. Henderson, Packard Bldg., Phil-  
 adelphia, Pa.  
 New Jersey .....Reynier J. Wortendyke, 15 Exchange Pl.,  
 Jersey City, N. J.  
 Delaware .....Henry R. Isaacs, 604-8 Industrial Bldg.,  
 Wilmington, Del.  
 Maryland .....Walter L. Clark, 1319 Fidelity Bldg., Bal-  
 timore, Md.  
 Dist. of Columbia..A. Coulter Wells, Union Trust Bldg.,  
 Washington, D. C.

#### Third District

Director .....William W. Gordon, Liberty Bank & Trust  
 Bldg., Savannah, Ga.  
 Virginia .....C. M. Chichester, The Law Bldg., Rich-  
 mond, Va.  
 North Carolina....Silas G. Bernard, Legal Bldg., Asheville,  
 N. C.  
 South Carolina....Henry E. Davis, F. & M. Bldg., Flor-  
 ence, S. C.  
 Georgia .....Francis M. Oliver, Citizens Trust Bldg.,  
 Savannah, Ga.  
 Florida .....Francis P. Fleming, Heard Bldg., Jack-  
 sonville, Fla.  
 Alabama .....Borden Burr, 1228 Brown-Marx Bldg.,  
 Birmingham, Ala.  
 Mississippi .....L. Barrett Jones, 300-4 Capital National  
 Bank Bldg., Jackson, Miss.  
 Tennessee .....William P. Metcalf, Exchange Bldg.,  
 Memphis, Tenn.

#### Fourth District

Director .....Frank M. Clevenger, Wilmington, O.  
 Michigan .....Wade Millis, 1401 Ford Bldg., Detroit,  
 Mich.  
 Ohio .....Daniel W. Iddings, Dayton Sav. & Tr.  
 Co. Bldg., Dayton, O.

Indiana .....Earl R. Conder, State Sav. & Tr. Bldg.,  
 Indianapolis, Ind.  
 West Virginia ....Harvey F. Smith, Clarksburg, W. Va.  
 Kentucky .....Arthur Peter, 716 Inter-Southern Bldg.,  
 Louisville, Ky.

#### Fifth District

Director .....R. Allan Stephens, 714 First National Bank  
 Bldg., Springfield, Ill.  
 Illinois .....Urban A. Lavery, 76 W. Monroe St.,  
 Chicago, Ill.  
 Wisconsin .....Arthur A. McLeod, Supreme Court, Mad-  
 ison, Wis.  
 Minnesota .....Chester L. Caldwell, 503 Guardian Life  
 Bldg., St. Paul, Minn.  
 Iowa .....Wesley Martin, 713 Des Moines St.,  
 Webster City, Ia.  
 North Dakota.....John Knauf, Jamestown, N. D.  
 South Dakota .....Jason E. Payne, Vermilion, S. D.  
 Nebraska .....Ralph A. Van Orsdel, 1212 First Nat'l  
 Bank Bldg., Omaha, Neb.

#### Sixth District

Director .....Eugene McQuillin, 300 Broadway, St.  
 Louis, Mo.  
 Missouri .....W. Scott Hancock, 1006 Boatmen's Bank  
 Bldg., St. Louis, Mo.  
 Arkansas .....George B. Rose, 314 W. Markham St.,  
 Little Rock, Ark.  
 Louisiana .....Edwin T. Merrick, 1107 Canal Com-  
 mercial Bldg., New Orleans, La.  
 Texas .....Walter H. Walne, Commercial Bank Bldg.,  
 Houston, Tex.  
 Kansas .....Geo. T. McDermott, 504 New England  
 Bldg., Topeka, Kan.  
 Oklahoma .....Jas. R. Keaton, 600 Terminal Bldg., Ok-  
 lahoma City, Okla.  
 New Mexico .....Merritt C. Mechem, Albuquerque, N. M.

#### Seventh District

Director .....Harold M. Stephens, 920 Continental Bldg.,  
 Salt Lake City, Utah.  
 Arizona .....Frank E. Curley, Tucson, Ariz.  
 California .....Chas. S. Cushing, First National Bank  
 Bldg., San Francisco, Calif.  
 Colorado .....Chas. R. Brock, Wight Bldg., Denver,  
 Colo.  
 Idaho .....Karl Paine, 411-414 Idaho Bldg., Boise,  
 Idaho.  
 Montana .....E. C. Day, Union Bank Bldg., Helena,  
 Mont.  
 Nevada .....Frank H. Norcross, Reno National Bank  
 Bldg., Reno, Nev.  
 Oregon .....Ben C. Dey, 815 Yeon Bldg., Portland,  
 Ore.  
 Utah .....C. A. Badger, 608 Boston Bldg., Salt Lake  
 City, Utah.  
 Washington .....Marion Edwards, 1460 Dexter Horton  
 Bldg., Seattle, Wash.  
 Wyoming .....Wm. C. Kinkead, 414-421 Hynds Bldg.,  
 Cheyenne, Wyo.

#### Eighth District

Director .....Herbert L. Faulkner, Goldstein Bldg.,  
 Juneau, Alaska.

#### Ninth District

Director .....Robbins B. Anderson, Stangenwald Bldg.,  
 Honolulu, H. T.

#### Tenth District

Director .....George A. Malcolm, Supreme Court,  
 Manila, P. I.

#### Eleventh District

Director .....Henry G. Molina, San Juan, P. R.

## AMERICAN INTERNATIONAL LAW SOCIETY MEETS

THE American Society of International Law held its twentieth annual meeting at the New Willard Hotel, Washington, D. C., from April 22nd to 24th, inclusive. This meeting is always held in Washington and is quite generally attended by members of the Society from all sections of the United States, as well as many members of the Diplomatic Corps in Washington.

The first session was called to order by the President of the Society, Honorable Charles Evans Hughes, on Thursday evening, April 22nd, at 8:30 o'clock. Mr. Hughes, as President of the Society, gave the opening address and reviewed the most significant international developments of the past year with special reference to the importance of the Locarno Pacts and the American adherence to the World Court. The Ex-Secretary of State, now unhampered by any official relation to the Government, was free to direct his keen analytical powers to a brief survey of the year's progress toward world peace. He pointed out that the key to all international action was national self-interest, and that national progress must therefore rest upon a broad and enduring community of international interest. He suggested that this community of interest might arise from a more general appreciation that even victorious war was poor business and decidedly not worth its cost. He stressed the fact that the Locarno agreements were unique in that they involved a complete submission of all international questions to arbitration. The success of Locarno, he said, would depend upon the extent to which it succeeded in making the way of the aggressor hard, and thus creating a preponderant conviction of the futility of war.

Mr. Hughes expressed the opinion that the outstanding international event with respect to the United States was our adhesion to the World Court. It meant that our fear of the League of Nations had been subordinated to an extent that permitted a reaffirmance of our traditional attitude with respect to international arbitration. In connection with the institution of the World Court it would be clear that a more complete body of law would be needed. This need would be met, he felt, by the newly launched movements for codification of international law by the League of Nations and the Pan-American Union. He also indicated that the failure of the broad scheme of arbitration contemplated by the Locarno Pacts would carry with it the progress already made in the field of international disarmament. He expressed himself as very hopeful over the developments of the past year and stated that in his opinion the progress made in the limitation of naval armament at the Washington Conference should be promptly followed up with a further limitation which would prevent dangerous competition in the construction of smaller naval craft.

Following the opening address, Mr. Clement L. Bouve, member of the Bar of the District of Columbia, read a paper on the right to confiscate alien property. Mr. Bouve gave a very brief but complete historical review of the policy of the United States with respect to the confiscation of alien property, elaborating upon the position as originally taken by Chief Justice Marshall that a belligerent had the right to confiscate enemy property but that such right would not be presumed to have been exercised unless there was specific statu-

tory authorization. Owing to the cumulative effect of usage among civilized countries he pointed out that twenty years later the Supreme Court recognized that this usage had hardened into customary law. He also invited attention to the advanced position that the United States had taken on this question in various international congresses.

At the conclusion of Mr. Bouve's paper President Hughes threw the meeting open to the discussion of the right to confiscate alien property. It is curious that in view of the timeliness of this discussion, the pendency of the Mills Bill (H. R. 10820) in Congress dealing with the disposition of former enemy alien property and the payment of American claims against Germany, and the recent sensational attack on the Bill by Congressman Garner, no one was disposed to discuss this question from the floor.

On Friday, April 23rd, at 10:00 A. M., Dr. Jesse S. Reeves of the University of Michigan presided over a Round Table Conference on the Function and Scope of Codification in International Law. The discussion was opened by Professor James W. Garner of the University of Illinois and Professor Joseph W. Bingham of Stanford University Law School. Considerable attention was given by the leaders to the meaning of the term Codification, the most effective forms of codification, and the most appropriate subjects of international law as bases upon which to initiate codification. At the conclusion of the formal discussion participation in the Round Table from the floor became general. The debate at times became so vigorous that the accuracy of the speakers' generalizations was quickly challenged, and it was frequently necessary to defer to the acknowledged authority of the trinity of Elder Statesmen present, namely, Dr. Bustamante, one of the judges of the Permanent Court of Justice, Ex-Attorney General Wickersham, member of the League of Nations Committee for the Progressive Codification of International Law, and Dr. James Brown Scott. It was the consensus of opinion that the general freedom of the Round Table discussion contributed to a greater appreciation of the difficulties and potentialities of this new movement.

The afternoon session was devoted to a Round Table Conference on the codification of international law in respect to nationality. Dr. Ellery C. Stowell, of the American University, presided. The discussion was opened by Richard W. Flournoy, Jr., Assistant to the Solicitor, Department of State, who has just sailed for Tacna Arica to assist General Lassiter in the handling of tangled questions of nationality incidental to the holding of the Plebiscite. Mr. Flournoy, the recognized authority on all questions of nationality at the State Department, read an excellent paper bringing out clearly some of the practical difficulties in the field of nationality by birth. He pointed out that nationality is a question of municipal law; that municipal law necessarily reflects divergent national policies and interests; that in accordance with these shifting national interests a nation incorporates into its municipal law so much of the fundamental principles of nationality by birth, that is, the principle of *jus soli* and the principle of *jus sanguinis*, as may serve its purpose. He demonstrated that this infinite variation in the systems of municipal law rendered the task of codification extremely difficult. He also suggested the

## Nichols' Annotated Forms


By  
**CLARK NICHOLS**

Author of Cooley Taxation  
(4th Ed.)  
Fletcher Cyclopedia  
Corporations  
(1921 Supplement)

Legal and Business Forms Annotated to Judicial Decisions

and Standard Legal Works

One Volume  
2350 Pages



Nichols' Is the Complete Annotated Form Book.

There Is No Other Like It!

**\$20<sup>00</sup>**

**Callaghan & Company** 401-409 E. Ohio St.  
CHICAGO  
Established 1864

relation of this subject to disarmament by reason of the extreme extension of the principle of *jus sanguinis* by militaristic nations desirous of conserving their man power although born abroad.

Dr. Henry B. Hazard, Chief Naturalization Examiner, Bureau of Naturalization, Department of Labor, read a carefully prepared paper on international problems in respect to nationality by naturalization. Dr. Hazard felt that the right of expatriation broadly declared in our Act of 1868 had been sufficiently recognized to become a part of international law. He also stressed certain difficulties incidental to the presumption of expatriation under the Act of March 2, 1907, and the Cable Act of September 22, 1922, making effective the principle of independent nationality for married women. The general discussion following the reading of the above papers brought out the embarrassments and hardships incidental to dual nationality and the total lack of national status as frequently happens under the Cable Act. There seemed to be a distinct difference of opinion as to the feasibility of the Cable Act legislation, although there was unanimity on the question of the need for the amendment of the Cable Act as it now stands in order to remove the status of *heimatlos* or statelessness which overtakes a British woman who marries an American national.

The further discussion of nationality questions was adjourned at 4:00 o'clock until Saturday morning at 10:00 A. M. in order to permit the members of the Society to be received at the White House by the President and Mrs. Coolidge.

The evening session of the Society was called to

order at 8:30 by President Hughes, who introduced Dr. Antonio Bustamante, Professor of International Law at the University of Havana, and Judge of the Permanent Court of International Justice. Dr. Bustamante read in English a clear and comprehensive address on the Progress of Codification under the auspices of the Pan-American Union. He pointed out that the series of Pan-American conferences extending back for almost half a century afforded the historical background and the international administrative machinery through the agency of the Pan-American Union for launching the Pan-American codification movement. He reviewed briefly several of the more important projects which had been formulated by the American Institute of International Law at the meeting at Lima, Peru, last year. Printed copies of the address were made available to members of the Society by Dr. Bustamante.

Following this address, Honorable George W. Wickersham of the New York Bar, former Attorney General of the United States and a member of the Committee of the League of Nations for the Progressive Codification of International Law, read a report reviewing the progress of codification under the auspices of the League. Mr. Wickersham directed attention to the fact that the Committee on which he had the honor of serving was an unofficial body inasmuch as the members were appointed at large—no member representing any particular nation. The plan of operation adopted by the Committee was to select certain subject matters for codification and then to assign a jurist as reporter for each subject, whose duty it was to draft a tentative project on that subject for submis-

sion to and revision by the full Committee. One of the subjects on which preliminary work was done at the last meeting was the law of nationality. Mr. Wickersham, while hopeful that some satisfactory codification might eventually be reached in this field, confirmed all that was said by Mr. Flournoy of the State Department at the preceding Round Table Conference with respect to the almost insurmountable difficulties surrounding this subject.

At the concluding session on Saturday morning, April 24th, the discussion of nationality was completed, and the balance of the session was devoted to the busi-

ness meeting of the Society including Reports of Committees, Election of Officers, and the meeting of the Executive Council.

The Annual Dinner of the Society was held at the New Willard Hotel Saturday evening at 7:30 o'clock. Honorable Charles Evans Hughes, re-elected President of the Society, presided as toastmaster, happily directing the attention of the guests and members of the Society to certain of the more humorous aspects of the discussions which had been vigorously carried on for the two preceding days.

HOWARD S. LEROY.

## NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

### Illinois

#### Illinois Association's Semi-Centennial

The largest attendance of any bar meeting ever held in Illinois is expected at the fiftieth annual meeting of the State Bar Association, to be held at Rock Island-Moline on June 24, 25, 26, according to a statement from President W. R. Moore of the Rock Island County Bar Association. Judges of the State Supreme Court and other distinguished guests will be present to help celebrate the semi-centennial of the state organization.

### Iowa

#### Program of Iowa Annual Meeting

Hon. Frederic R. Coudert of New York will deliver the annual address at the meeting of the Iowa State Bar Association to be held at Davenport on June 17 and 18. Hon. Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio, is another of the distinguished speakers who will address the association. The Very Reverend Marmaduke Hare of Davenport will deliver the invocation at the opening session on June 17, after which Mr. John E. Cross of Newton will deliver the address of welcome and Mr. C. D. Waterman of Davenport will respond. Then will follow the report of the membership committee, the election of new members and a report of the meeting of the American Bar Association. President J. E. E. Markley of Mason City, will deliver the presidential address at the conclusion of the last report.

The afternoon session will be given to the reports of various committees, which will be continued into the session of the following morning. Chief Justice Marshall will then deliver his address and Mr. Coudert will follow at the afternoon session. The annual banquet will be Thursday evening, and Hon. J. E. E. Markley will act as toastmaster. Responses will be made by Mr. J. R. Files of Fort Dodge, Hon. M. F. Donegan of Davenport, Hon. W. D. Evans of Hampton and Hon. C. E. Pickett of Waterloo.

### Maryland

#### Maryland Bar to Meet at Atlantic City

The thirty-fifth annual meeting of the Maryland State Bar Association will be held at the Chelsea Hotel, Atlantic City, N. J., on June 24, 25, 26. The meeting will be called to order Thursday at 10:00 A. M. by President John C. Rose. His address will be followed by the Reports of Standing and Special Committees. Addresses will be made by Hon. George W. Wickersham, former Attorney-General of the United States; Hon. William J. Donovan, Assistant to the Attorney-General of the United States; Walter C. Capper, of the Cumberland Bar; Calvin Chesnut and Charles McHenry Howard of the Baltimore Bar. The banquet will be held on Saturday evening with George Weems Williams of the Baltimore Bar as Toastmaster, and Henry A. Wise of Virginia and Judge John J. Parker of Charlotte, North Carolina, member of the United States Circuit Court of Appeals for the Fourth Circuit, among the speakers.

The Committee on Nominations has recommended the following for Officers and Members of the Executive Council for the ensuing year: President, Alexander Armstrong, Hagerstown. Vice-presidents: First Circuit, L. Paul Ewell, Pocomoke City; second, Fred R. Owens, Denton; third, William P. Cole, Jr., Towson; fourth, F. Brooke Whiting, Cumberland; fifth, Ridgeley P. Melvin, Annapolis; sixth, Edward S. Delaplaine, Frederick; seventh, M. Hampton Magruder, Upper Marlboro; eighth, W. Calvin Chesnut, Baltimore City; ninth, Charles C. Wallace, Baltimore City. Treasurer, R. Bennett Darnall, Baltimore City; secretary, James W. Chapman, Jr., Baltimore City. Executive Council: Thomas H. Robinson, Belair; Walter L. Clarke, Baltimore City; Arthur W. Machen, Jr., Baltimore City.

JAMES W. CHAPMAN, JR.,  
Secretary.

### Michigan

#### Michigan Bar's Annual Meeting

The Michigan State Bar Association will hold its annual convention at Benton Harbor on Sept. 3 and 4. President

George M. Valentine of the Berrien County Bar Association, which will act as host, has appointed the following committee to make arrangements for the occasion: R. E. Barr and Fremont Evans of St. Joseph; Probate Judge William H. Andrews and Mr. Sterling, of Benton Harbor; Stuart B. White, of Niles, and A. A. Worthington, of Buchanan.

On Sept. 2, the day preceding the State Bar meeting, the justices of the Michigan Supreme Court and the circuit judges will hold their annual meeting, also at Benton Harbor. The judges' meeting will be the first ever held outside of Lansing. Hitherto their annual meeting to select a presiding judge for the year has been held at the capital by direction of the law, but the last legislature removed this necessity.

### Mississippi

#### Mississippi State Bar Meets

The Mississippi State Bar Association held its 1926 meeting at Biloxi on May 5th and 6th.

The attendance was very satisfactory and the meeting was a most delightful one. Headquarters were established at the Buena Vista Hotel, in the convention hall of which the meetings were held.

In a well worded and "snappy" address J. J. Kennedy, Mayor of Biloxi, extended the welcome of the city. The response to the address of welcome was made by Hon. L. T. Kennedy of Natchez. The annual address of the president, Hon. J. N. Flowers of the Jackson bar, was well received and contained many helpful suggestions concerning conditions with which Mississippi is confronted.

The annual address was made by Hon. F. Dumont Smith of Hutchinson, Kansas, who chose as his subject "Amendments to the Constitution." Mr. Smith needs no introduction to the members of the American Bar Association nor to the readers of the JOURNAL. While there may be one or two amendments to the Constitution that do not meet with their entire approval, the Constitution itself has become dear to the hearts of Southerners, and since Mr. Smith seems to have been at his best, it is needless to say that his speech was enjoyed and appreciated by all.

Judge R. H. Thompson of Jackson, a former president of the association, read

a most excellent paper on the subject of "Mississippi Codes." In this paper he took up and discussed each and every Code of Mississippi, some of which were adopted during the years that Mississippi was a territory. The paper was evidently the result of hours of labor and research on the part of Mr. Thompson and is of much value from an historical standpoint.

A very unique feature of the program consisted of an informal talk by Alf H. Stone of Dunleith. Mr. Stone in the direct and effective manner which always characterizes his public utterances, recalled some of his recollections of Judge Wiley P. Harris. Judge Harris was without doubt the leader of the Mississippi bar in his generation. And it is doubtful if Mississippi ever did or ever will produce his equal as a lawyer. Mr. Stone's informal talk was indeed a treat to all who were fortunate enough to hear it.

The report of the executive committee showed that 42 new members were added to the roll since the last meeting.

The following officers were elected for 1926; D. W. Houston, Sr., Aberdeen, president; T. C. Hannah, Hattiesburg, vice-president; J. T. Brown, Jackson, secretary-treasurer; E. C. Sharp, Booneville, J. L. Byrd, Jackson, and W. A. White, Gulfport, were elected members of the executive committee.

The annual banquet which was given in the main dining room of the Buena Vista Hotel was a most enjoyable affair. The management of the hotel left nothing to be desired in making this banquet an affair of its kind long to be remembered. President Flowers presided at the banquet and the toasts responded to by Louis Jiggetts, R. J. Farley, Thomas L. Bailey, Mr. Smith and the President-elect were all good, but the main attraction was furnished by the young ladies of Gulf Park College, who put on a very interesting and enjoyable program.

The splendid entertainment furnished by the local bar contributed largely to the success of the meeting.

Jackson was selected as the next place of meeting.

J. T. BROWN, Secretary.

## West Virginia

### Secretary Hoover to Speak to Bar

Hon. Herbert Hoover, secretary of commerce, will deliver the annual address at the meeting of the West Virginia State Bar Association, to be held at Martinsburg on Sept. 30-Oct. 1.

## Miscellaneous

### Legislators' Association Indorsed

The Denver Bar Association's May meeting was devoted to an address concerning The American Legislators' Association, the organization of which was undertaken about six months ago. Membership in this organization is confined to the eight thousand legislators who are in office in the United States, each

of whom is, ex-officio, a member of the Association. In each branch of each of the forty-eight state legislatures, the members have elected a Local Council, and twelve Standing Committees are being formed, each composed of ninety-six members—one from each branch of each state legislature. An Advisory Board of preeminent authorities has been organized for each of these twelve Committees, each Advisory Board being limited to thirty members.

The Association is issuing a monthly leaflet known as "The Legislator," which is sent to every legislator in the United States, the June issue being the sixth number.

At the conclusion of the Denver Bar Association's meeting on May 3, 1926, the following resolution, presented by James Grafton Rogers, President of the Colorado Bar Association, was unanimously adopted:

"Resolved that the Denver Bar Association hereby records its indorsement and approval of The American Legislators' Association.

Secretaries of State and Local Bar Associations will confer a favor by sending the Journal news of the interesting and important activities of their organizations for publication in this Department.

Address all communications to American Bar Association Journal, Room 1119, The Rookery Building, No. 209 S. La Salle St., Chicago, Ill.

"This organization, which originated with State Senator Henry W. Toll, a member of this Association, has secured the interest and co-operation of a number of responsible citizens of this state, and of a still larger number of nationally known leaders in public affairs. We believe that it may afford a useful clearing house and forum, and may result in desirable co-operation between the legislators and the legislatures of the various states. We believe that it may facilitate the enactment of uniform state laws, a subject in which lawyers of the country have shown an active interest for more than a generation, that it may produce other co-operative legislation, concerning tax matters and other important subjects, and that it may bring about a better understanding of the American problems of legislation.

"We express our confidence in the present administration of the Association, and instruct our President to present the matter, in some appropriate way, to The American Bar Association for consideration at its next Annual Meeting and to request it to consider the propriety of according its official approval and co-operation to The American Legislators' Association. A Committee of five shall be appointed by our President to co-operate with him in this matter."

Since the foregoing action was taken by the Denver Bar Association, similar

resolutions have been adopted by the Law Club of Denver and by the Executive Committee of the Colorado Bar Association. The El Paso County Bar Association is also interesting itself in the advancement of this undertaking.

## Unknown and Missing Heirs—Searched For

An international organization serving Lawyers and working along ethical lines in the search for heirs and legatees in matters intestate, testate or contested; also owners of dormant bank accounts, trust balances that have terminated, etc.

We advance all expenses and handle cases on contingent basis.

Lawyers and others cooperating with us in behalf of heirs found receive adequate compensation.

Booklet re our services and activities sent to Lawyers on request. Legal representatives listed for emergency service.

**W. C. COX & COMPANY**  
Federal Reserve Bank Bldg., CHICAGO

For Sale—Only abstract business in rich Middle Western county, population 80,000. This old-established business has been conducted profitably for years by present owners who, because of advancing years and the demands of constantly increasing business, desire to relinquish responsibilities. Capital stock \$100,000. Offices maintained in two cities. Business will pay good salary and dividends for two principals. Rigid investigation of this proposition invited only from parties who mean business. R. S. Davis, 1110 Bestmen's Bank Bldg., St. Louis, Mo.

## THE SUPREME COURT JUDGE: AN APPRECIATION

(From W. Va. Bar Association Notes)

Did the sun shine today?  
He knew it not.  
Were the skies gray-curtained?  
It made no impress on his mind,  
Except, perchance, to make the task  
Of seeing truth and meting out the law  
A shade more difficult.

The pageant of Life goes by unseen by him.

The call of Spring from brook and meadow,  
Summer, flinging wide her treasures  
with lavish hand,  
Autumn, gilding a thousand hilltops  
with glory incomparable,  
Winter's fairy frostwork,  
All these unheeded.

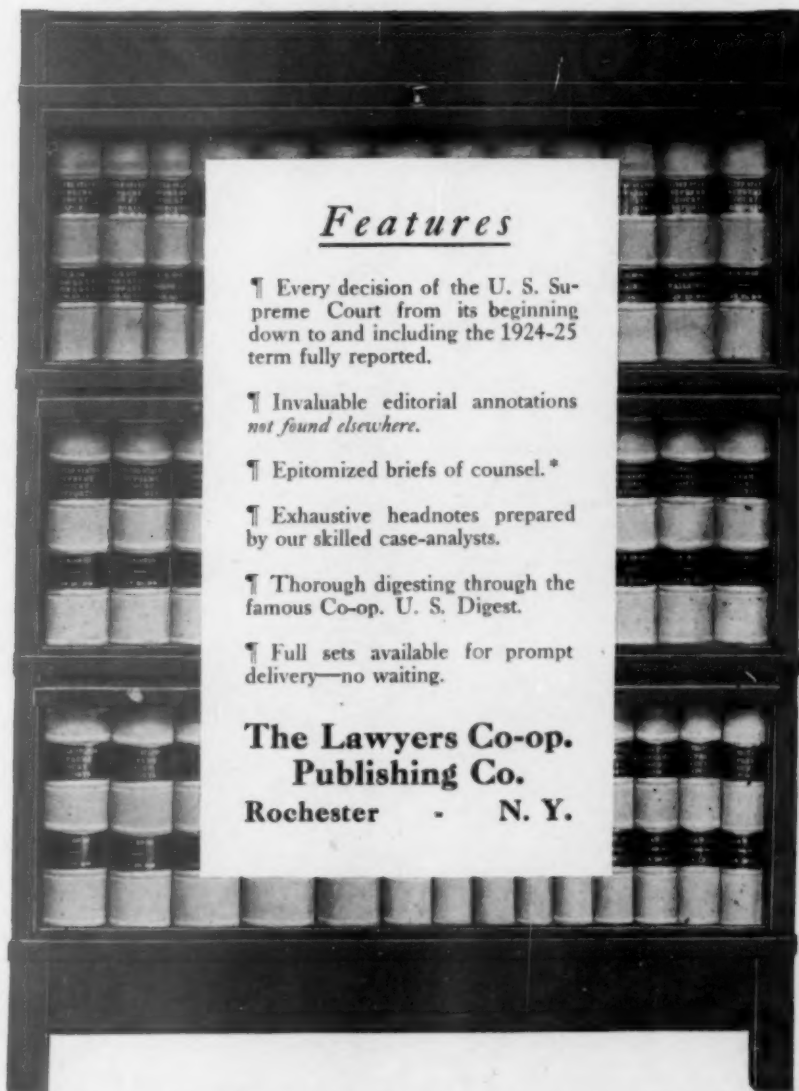
For he, into whose hands  
The people have committed trust,  
Must labor without pause, else be engulfed  
Beneath the never ceasing, ever deepening  
tide of work.

Below, the roar of traffic.  
Men hurry to and fro;  
Women, bright-decked,  
Like flowers swaying on the pavements;  
Laughing youth, happy children;  
Each intent upon the thing that to him  
means attainment.  
Above, he toils long hours  
At desk o'er-spread with weighty tomes  
And littered deep with papers.  
Keen eyes that single out the truth,  
Honest hands that poise with care  
The wavering scale of judgment,  
Voice that without fear or favor  
Proclaim The Law as he conceives it  
To be true and right,  
That, in the end, man shall to man give  
justice,  
And women may go safely on their way,  
And children laugh!

L. L. H.  
Charleston, W. Va., Oct. 26, 1925.

# WE ARE ADVERTISED BY OUR FRIENDS

*The Popular-Priced Set of U. S. Reports, L. ed.*



## Features

¶ Every decision of the U. S. Supreme Court from its beginning down to and including the 1924-25 term fully reported.

¶ Invaluable editorial annotations *not found elsewhere.*

¶ Epitomized briefs of counsel.\*

¶ Exhaustive headnotes prepared by our skilled case-analysts.

¶ Thorough digesting through the famous Co-op. U. S. Digest.

¶ Full sets available for prompt delivery—no waiting.

**The Lawyers Co-op.  
Publishing Co.  
Rochester - N. Y.**

*The U. S. Department of Justice has just placed with us a large order for sets of the U. S. Reports, Lawyers' Edition, for use by the Federal Courts.*

\*In 3 Peters vi is found the following letter from Chief Justice Marshall which gives the authority of the court for the inclusion of briefs of counsel in the U. S. Reports.

*Supreme Court Rooms,  
Washington, March 22, 1830.*

My dear Sir:

I laid your letter before the court and found a general disposition among the judges to approve of the course which you should yourself think most

eligible. I believe we all think that the arguments at the bar ought, at least in substance, to appear in the reports. They certainly contribute very much to explain the points really decided by the court. If this cannot be done in one volume, I should think it advisable to give us two. With great respect and esteem, I am, dear sir,

Your obedient,  
J. Marshall.

Richard Peters, Esq.

There is an apparent discre

The pages are either missin

The filming is recorded as

discrepancy at this point.

missing or the pagination is incorrect.

and as the book is found in the collections.

# LETTERS OF INTEREST TO THE PROFESSION

## Conditions in Federal District Courts

EDITOR AMERICAN BAR ASSOCIATION JOURNAL:

The dockets of the District Courts of the United States are congested to an extent which is appalling, due to the numerous prosecutions for violations of petty misdemeanors, many of them punishable by a fine only.

The result is that important civil suits cannot be brought to trial as promptly as the rights of litigants demand, and in many instances these delays result in a miscarriage of justice.

Persons whose property is destroyed by fire; death of one insured for the benefit of his family, dependent on the insurance; persons seriously injured by reason of the alleged negligence of parties, and who by reason thereof are incapacitated to earn a living for their families, must frequently resort to the courts, but by reason of the congested conditions of the dockets cannot obtain a trial for a long time.

Whether entitled to a recovery or not, they are entitled to an early hearing, in order that they may obtain what they are entitled to, or know that they cannot recover.

Delays in the trials of criminal cases are not conducive to the enforcement of the law, as witnesses frequently disappear, or suffer from poor memory.

Congress should provide some remedy for a speedy disposition of all actions.

Another evil is that the dignity of the federal district courts has been to a great extent destroyed by the requirement that all criminal cases, no matter how trivial, can only be tried in those courts, and to a jury. The motley crowds seen now in those courts, as defendants or witnesses is nauseating. Lawyers, whose practice was heretofore confined to police and magistrates' courts, who were never seen in a federal court, now crowd them, defending parties charged with violations of the national prohibition law and similar offenses of a petty nature, who, if charged with violations of petty offenses of the laws of the state would only be tried in inferior courts.

Why cannot Congress provide for inferior courts, such as municipal and police courts, which all the states have established, with original jurisdiction of all misdemeanors, which can be prosecuted by informations, and provide for trials of those charged with offenses, punishable by fines only, by the court without a jury?

These judges could also act as examining magistrates in felony cases, thereby dispensing with United States Commissioners, whose fees amount to considerable, and which office could be entirely dispensed with.

The act may provide for an appeal to the district court, and make the judgment of that court final, except in cases involving the constitutionality of an Act of Congress, or the construction of the Act, not theretofore construed by an appellate court of the United States. The appeal to the Circuit Court of Appeals to be discretionary by application for a certiorari, as is now provided for reviews of judgments of those courts by the Supreme Court.

As these courts can be made courts of record, it would perhaps be best to provide that upon such appeals to the district court that court should sit as an appellate tribunal and act on the record of the trial court, shown by a bill of exceptions, as in writs of error from the Circuit Courts of Appeals. This would dispense with a second trial and relieve the district courts appreciably and save the government the expense of attending witnesses, and the time necessary for a trial.

Of course the judges of these inferior courts would under the constitution have to be appointed by the President for life or during good behavior by and with the consent of the Senate.

If a fair salary is granted, no doubt lawyers of ability could be secured for these judgeships, especially, as they would be in the line of promotion, if qualified.

These courts would always be open for pleas, or trials not requiring a jury, and when necessary there could be quarterly jury terms, jurors to be selected by jury commissioners in the same manner as jurors are selected for the district courts.

Such a law would relieve the district courts of a great many cases, enable them to accelerate the trials of serious criminal prosecutions and of civil cases, restore the dignity

of these courts, and also relieve the Circuit Courts of Appeals of many trivial cases, which are now removed to those courts for the purpose of delay only.

The conditions now prevailing in the District Courts require some action and consideration by the American Bar Association, in order to create a public opinion which will result, not only in relieving the District Courts to a great extent, but in the better enforcement of the criminal laws, a speedier disposition of civil actions, and a restoration of the dignity of these courts.

The legislative committee of the American Bar Association may be able to suggest a better remedy than that suggested by me, but there should be some remedy provided, to reform the conditions now prevailing in the federal district courts.

JACOB TRIEBER,

U. S. Dist. Judge, 8th Dist. of Arkansas.

## Build a House for U. S. Supreme Court

EDITOR OF THE AMERICAN BAR ASSOCIATION JOURNAL:

In the issue of the New York *Herald Tribune* on Saturday, May 15th, was a very timely and able leading editorial advocating the erection at Washington of a building to house the Supreme Court of the United States. It must surely have appealed to every lawyer and the idea thus advanced, it seems to me, should have the support of the American Bar Association and of every Bar Association in every State of the Union and of every legal Journal.

I am writing to suggest that the matter be taken up promptly by all such Associations. Even in our own city, we have a separate building for the Appellate Division of our Supreme Court and in Albany a separate building for our Court of Appeals. Such editorial well said, "outward signs and trappings are not essential to greatness. The Supreme Court has achieved distinction despite cramped and undignified quarters in the Capitol, in the discarded chamber of the Senate. But the spirit needs a fitting embodiment."

Why should the United States Supreme Court, which the editor rightfully called the greatest court in the world, any longer continue in "cramped and undignified quarters"? Old memories, traditions, historic deeds may be associated with these "cramped and undignified quarters," but these should no longer prevent the Federal Judiciary having with the Executive and Legislative "a corresponding house of fitting beauty and dignity, thus independently placed to symbolize its parity with the co-ordinate branches of the government" so that "the structure of the institution would be written large and beyond misconception on the face of the Capital" and all "visiting the seat of national government . . . understand this tripartite system."

My astonishment is that this so exceedingly desirable project has not before this been pointed out, pursued and accomplished. The New York *Herald Tribune* having begun, I trust our legal Journals will continue to call attention to this need, to this cause, as said editor well wrote, "greater than any individual that has arrived in the nation's history or can arrive."

It is well that we have at the Capital so honored Washington and Lincoln, but it will be a discredit to the nation if much longer "the simple perfection of the Washington design" is not "completed by this logical tribute to the greatest court in the world placing it beyond question or derogation for all time to come."

At the east end the Capitol, at the west end the Lincoln Memorial. At the Central crossing the Washington Monument. To the north the White House. To the South, the House of the Federal Judiciary, "Completing the Capital."

Some one of our multimillionaires could gain an imperishable name by a gift of such a building to the nation.

But it is more fitting that it should be the nation's contribution to this co-ordinate branch of its Government.

Speed the day when the Court House of the United States Supreme Court shall be one of the sights of Washington.

BENJAMIN F. EDSALL

New York City, May 17, 1926.